Supreme Court, U.S.
FILED
FEB 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1343

No. 85-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MARK A. HUMPHREY AND FREDD J. HAAS,
d/b/a HUMPHREY & HAAS,
Appellants,

v.

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT
OF THE IOWA STATE BAR ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

JURISDICTIONAL STATEMENT

MARK W. BENNETT
BABICH, BENNETT & NICKERSON
5835 Grand Ave.
Suite 202
Des Moines, Iowa 50312

CHARLES S. SIMS
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43d St.
New York, N.Y. 10036

CHARLES A. HORSKY*
DAVID H. REMES
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for Appellants

February 11, 1986

*Counsel of Record

QUESTIONS PRESENTED

1. Do the standards established by this Court under the First Amendment for regulating lawyer advertising apply to advertising on television?

2. Are Iowa's rules banning "dramatic" voices and "self-laudatory" statements in lawyer advertising impermissibly vague, on their face or as applied?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND RULES INVOLVED	2
STATEMENT	2
1. The Advertisements	3
2. The Complaint and Answer	4
3. The Evidentiary Hearing	6
4. The Iowa Court's Initial Decision	9
5. The Iowa Court's Decision on Remand	11
THE QUESTIONS ARE SUBSTANTIAL	13
A. The Ban on Dramatization Violates the First Amendment on Its Face and as Applied	14
B. The Ads Here Were Not Potentially Misleading "In the Medium Defendants Chose"	18
C. The Ban on "Dramatic" Voices and "Self-Laudatory" Statements also Violates the First Amendment	20
CONCLUSION	21

(Appendices Are Separately Bound)

TABLE OF AUTHORITIES

CASES:	Page
Bates v. *State Bar*, 433 U.S. 350 (1977)	*passim*
Capital Broadcasting Co. v. *Mitchell*, 333 F. Supp. 582 (D.D.C. 1971) (3-judge court), *aff'd mem.*, 405 U.S. 1000 (1972)	18
FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978)	17
FTC v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965)	16
In re Primus, 436 U.S. 412 (1978)	14, 16
In re R.M.J., 455 U.S. 191 (1982)	14
Linmark Associates, Inc. v. *Township of Willingboro*, 431 U.S. 85 (1977)	15
Ohralik v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978)	14
Thomas v. *Collins*, 323 U.S. 516 (1945)	16
Zauderer v. *Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985)	*passim*

CONSTITUTIONAL AND STATUTORY PROVISIONS:	
U.S. Const., Amend. I	*passim*
U.S. Const., Amend. XIV, § 1	*passim*
28 U.S.C. § 1257(2)	1
28 U.S.C. § 1257(3)	1
Ala. Temp. DR 2-102(B)	15
Alaska DR 2-101(D)	15
Ariz. ER 7.2(b)	15
Ark. R. 7.2(b)	15
Cal. R. 2-101(E)	15
Colo. DR 2-101(D)	15
Del. R. 7.1(c)(3)	15
D.C. DR 2-101(D)	15

	Page
Fla. DR 2-101(D)	15
Ga. R. 4-102, Stand. 7(B)	15
Hawaii DR 2-101(D)	15
Ill. R. 2-101(e)	15
Ind. DR 2-101(E)	15
Kan. DR 2-101(B)	8
Ky. SCR 3.135(6)(a)(ii)	15
Me. R. 3.9(d)	15
Minn. R. 7.2(b)	15
Miss. DR 2-101(G)	15
Mo. R. 7.2(b)	15
Mont. R. 7.2(b)	15
Neb. DR 2-101(B)	15
Nev. R. 164(3)	15
N.H. R. 7.2(b)	15
N.J. RPC 7.2(a)	8
N.M. DR 2-101(I)	15
N.Y. DR. 2-101(F)	15
N.C. R. 2.2(B)	15
N.D. DR 2-101(D)	15
Ohio DR 2-101(D)	15
Okla. DR 2-102(B)	15
Or. DR 2-101(C)	15
S.C. DR 2-101(D)(1)	15
S.D. DR 2-101(D)	15
Tenn. DR 2-101)(F)	15
Tex. DR 2-101(E)	15
Utah DR 2-101(A)(2)	15
Vt. DR 2-101(B) & (D)	8
Va. DR 2-101(B)	15
Wash. RPC 7.2(b)	15
W. Va. DR 2-101(B)	8
Wyo. DR 2-101(B)	8

Page

MISCELLANEOUS:

ABA Model Code of Professional Responsibility
DR 2-101(B) 8
DR 2-101(D) 15

ABA Model Rules of Professional Conduct
Rule 7.2 9
Rule 7.2(a) 8, 13
Rule 7.2(b) 12, 15

Federal Trade Commission, Cleveland Regional Office and Bureau of Economics, *Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising* (Nov. 1984) 9

TvB News, Sept. 27. 1985 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-

MARK A. HUMPHREY AND FREDD J. HAAS,
d/b/a HUMPHREY & HAAS,
Appellants,

v.

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT
OF THE IOWA STATE BAR ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Iowa Supreme Court's initial opinion in this case (App. 1a-24a) is reported at 355 N.W.2d 565. Its opinion on remand from this Court (App. 25a-55a) is reported at 377 N.W.2d 643.

JURISDICTION

The judgment of the Iowa Supreme Court, embodied in its opinion (App. 25a), was issued on November 13, 1985. A notice of appeal to this Court (App. 56a) was timely filed on November 20, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2). Insofar as any of the questions presented may properly be here on certiorari rather than appeal, this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

U.S. Const., Amend. I:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

U.S. Const., Amend. XIV, § 1:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

DR 2-101 of the Iowa Code of Professional Responsibility for Lawyers is set forth in Appendix D (App. 58a-65a).

STATEMENT

This case involves the scope of a state's power under the First Amendment to restrict lawyer advertising on television. The controversy centers on DR 2-101(B) of the Iowa Code of Professional Responsibility for Lawyers, which permits lawyers advertising on television to display only what may appear in a printed advertisement; the only sound allowed is the "nondramatic" voice of an announcer reading the message that is displayed. Other than in illustrations or photographs, no one may appear on screen. The lawyer himself may not address his audience.[1]

---

[1] DR 2-101(B) currently provides that information allowed in print advertisements may be communicated by radio or television,

> "articulated only by a single nondramatic voice, not that of the lawyer, and with no other background sound. . . . In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer." (App. 59a.)

Prior to amendments to the rules issued by the Iowa Supreme Court on November 8, 1985, lawyers were forbidden to use illustrations or pictures in print advertising, and could display "words and numbers only" in television advertising. Under the rules as amended, it appears that lawyers advertising on television may display illustration and

The Iowa Supreme Court in September 1984 enjoined the appellants from airing advertisements that contravene DR 2-101, and sustained the rule against First and Fourteenth Amendment challenge. This Court in June 1985 vacated the Iowa court's judgment (105 S. Ct. 2693) and remanded the cause for further consideration in light of *Zauderer* v. *Office of Disciplinary Counsel*, No. 83-2166 (May 28, 1985). On remand, the Iowa court in November 1985 reaffirmed its initial decision, "find[ing] nothing in the *Zauderer* holding at variance with our prior decision." (App. 26a.)

1. The Advertisements

Over a three-day period in early September 1982, the law firm of Humphrey, Haas & Gritzner aired three advertisements over WHO-TV in Des Moines, Iowa. The first ad featured an actor and actress portraying a physician and a nurse in an examination room. While the nurse looked at an X ray, the doctor addressed the viewer:

> "We see first-hand injuries caused by the neglect of others. If you're seriously injured through the negligence of others, you should be talking to a lawyer. The choice of a lawyer could be important. That's something to think about."

The second ad featured an actor portraying a printer. Standing in front of a printing press, he addressed the viewer:

> "I suffered loss of wages, incurred staggering medical bills and endured pain and suffering all through the negligence of others. I wasn't aware of my legal rights. I should have been talking to a lawyer."

---

pictures; but the use of live action and background sound — the crux of the controversy in this case — remains forbidden.

The third featured two actors portraying bowling partners. The following conversation took place at the lanes:

"Bowler #1: I've got to throw like that today, we're one man short.

Bowler #2: He was injured through the negligence of others.

Bowler #1: He should be talking to a lawyer.

Bowler #2: The choice of that lawyer will be important.

Bowler #1: That's something to think about."

After the dramatization, the scene in each ad shifted to the reception area of a law office, with an actress portraying a receptionist. As the name, address, and phone number of the firm were superimposed on this picture, an off-camera announcer said:

> "If you're injured through the negligence of others, call the law firm of Humphrey, Haas & Gritzner. Cases involving auto accidents, work comp, serious personal injuries and wrongful death handled on a percentage basis. No charge for the initial consultation. Call now at 288-0102."

2. The Complaint and Answer

The three ads were scheduled to run four days a week for 47 weeks. (Tr. 25.)[2] After three days on the air, however, they were discontinued by the station at the request of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association. (Tr. 29.) The Committee then brought an original action in the Iowa Supreme Court against Humphrey, Haas & Gritzner, alleging that

---

[2] "Tr." refers to the transcript of the evidentiary hearing ordered by the Iowa Supreme Court in this case. See pp. 6-8, below.

their ads violated DR 2-101 of the Iowa Code of Professional Responsibility for Lawyers because they

> "contain more than a single nondramatic voice, have background sound and visual displays of two or more people characterizing themselves as clients which make laudatory comments as to Defendants' services." Petition ¶ 7 (App. 72a).[3]

The Committee asked that the Iowa Supreme Court permanently enjoin the lawyers from airing the ads in question or any other ads that violate the Code (App. 73a-74a); meanwhile, it initiated a disciplinary investigation of Humphrey and Haas, which has been stayed pending disposition of this action.[4] On September 14, 1982, the Iowa Supreme Court, on the Committee's *ex parte* application, enjoined Humphrey and Haas from airing their ads pending further proceedings. (App. 81a-82a.)

Humphrey and Haas did not dispute that their ads used more than a single voice and contained background sound and visual displays. But, seeking both to defend against the requested injunction and to invalidate the rule on its face, they urged that DR 2-101's restrictions of lawyer advertising violate the First and Fourteenth Amendments, both facially and as applied; and they urged that

---

[3] In addition to DR 2-101(B)'s ban on dramatization (App. 59a), DR 2-101(A) prohibits "self-laudatory" statements in lawyer advertising (App. 58a). The Committee alleged that the ads also violated DR 2-105 (App. 65a-70a), which, at the time, allowed lawyers advertising in print to list not more than three fields of practice and required that such listings be accompanied by a disclaimer of expertise. Petition ¶ 8 (App. 72a). Because of subsequent amendments to the rules, the Iowa court's judgment on remand does not present any question under DR 2-105.

[4] Committee on Professional Ethics and Conduct, *In re Humphrey, Haas & Gritzner,* File No. 8283-53 (notice of complaint issued September 16, 1982). After the Committee commenced its action, Gritzner withdrew from the firm and was dismissed as a defendant.

the rule's ban on the use of "dramatic" voices and "self-laudatory" statements is impermissibly vague. (App. 76a-80a.)

3. The Evidentiary Hearing

Two weeks after the Iowa Supreme Court entered its injunction, it appointed a commissioner to conduct an evidentiary hearing and to prepare a written summary of the evidence. (App. 83a.) Following discovery, the hearing was held, and the commissioner's summary was filed with the court on November 16, 1983. (App.85a.) The evidentiary hearing focused entirely on the state's justification for DR 2-101's prohibition of dramatization in lawyer advertising on television, and on the supposedly objectionable characteristics of the three ads.

The Committee's principal justification for DR 2-101's prohibition was that dramatization may appeal to a viewer's "emotions," interfering with "rational" choice, and that dramatization is "unnecessary" to convey pertinent information. Former Justice Robert Allbee, who was a member of the Iowa Supreme Court when it adopted DR 2-101(B), explained that the likely viewers of such advertising "are ordinarily of a lower intellectual category and they are less able to make an objective conclusion from something that is passed by them in dramatic form." (Tr. 95.)[5]

---

[5] In addition to "prevent[ing] purely emotional reactions or emotional impact in the selection of lawyers" (Tr. 86-87), Justice Allbee testified that the ban was intended "to guard the public against deception either inadvertent or intended, and in turn to protect the trust and the integrity that we want the public to have in the legal profession. That the public not obtain the view that merchandising legal services is like merchandising vintage wine." (Tr. 87; see App. 89a.)

The Committee made no claim that the ads were in fact false, deceptive, or misleading. To the contrary, Dr. Richard Haynes, an expert retained by the Committee, testified that he saw nothing inherently misleading or deceptive in the use of dramatization (Tr. 210-12; see App. 91a), and that the ads in question had not been perceived as misleading or deceptive by a group of viewers paid by him to watch them. (Tr. 210, 258; see App. 90a.) He affirmed that dramatization is effective precisely because it "involve[s] and interest[s] the viewer" (Tr. 276); indeed, he found that 75 percent of the viewers paid to watch the ads rated them a fair-to-excellent way of educating viewers about their rights. (Tr. 265.)

The Committee's counsel sought to elicit testimony that dramatization in television advertising can generate an exaggerated sense of need for a lawyer's services, and can imply distinctions between lawyers that are no more genuine than the distinctions between name-brand and generic aspirin. But none of the evidence suggested that any such effects are either inherent in or peculiar to dramatized television advertising. Nor was there any evidence that the ads here caused such effects or that such effects, if they were to occur, would distort consumer choice. The defense presented extensive testimony that lawyer advertising does not create a need for legal services and that a consumer's exercise of choice is inevitably more deliberate in hiring a lawyer than in purchasing bathroom tissue. (*E.g.*, Tr. 335, 618-19, 699.)

The Committee did not controvert the extensive defense evidence that dramatization is critical for effective television advertising. The evidence demonstrated, to the contrary, that dramatization enables advertisers to capture the viewer's attention (*e.g.*, Tr. 378, 562, 686), causes the

viewer to remember the message being conveyed (*e.g.*, Tr. 281, 379, 712), and "break[s] down the barrier that exists between the public and lawyers" (Tr. 457). The Committee offered no evidence to rebut the testimony of defense witnesses that ads conforming to the restrictions of DR 2-101 are more likely to mislead viewers than dramatized ads precisely because they look *less like ads* than those employing dramatization. (*E.g.*, Tr. 688, 690-91, 754.)

Lori Andrews, research attorney for the American Bar Foundation and former staff director of the ABA Commission on Advertising, testified that more than 40 states permit lawyer advertising on television using dramatization, visual displays, background sounds, and the like. (Tr. 330-31; see App. 91a.) She pointed out that DR 2-101 contains independent prohibitions against false, deceptive, and misleading statements or claims in lawyer advertising (Tr. 334), and she noted that the trend is simply to forbid such statements or claims, and to permit ads of the type aired in this case. (Tr. 332; see App. 92a.)[6]

---

[6] As of January 1986, five other states — Kansas, New Jersey, Vermont, West Virginia, and Wyoming — had on their books television advertising restrictions comparable to Iowa's or more severe. See Kan. DR 2-101(B); N.J. RPC 7.2(a); Vt. DR 2-101(B) & (D); W. Va. DR 2-101(B); Wyo. DR 2-101(B). Amendments that would relax these restrictions are under consideration in Kansas and West Virginia.

Rule 7.2(a) of the ABA's Model Rules of Professional Conduct permits lawyer advertising through any public media, including television, so long as it is not false or misleading and does not involve "solicitation." DR 2-101(B) of the ABA's Model Code of Professional Responsibility also permitted lawyer advertising on television, without special restrictions based on the lawyer's choice of medium. The ABA's Comment on Model Rule 7.2(a) states:

> "Television is now one of the most powerful media for getting information to the public, particularly persons of low

4. The Iowa Court's Initial Decision

Notwithstanding this record — or the views of the Federal Trade Commission, which filed an *amicus* brief supporting Humphrey and Haas[7] — the Iowa Supreme Court in September 1984 sustained the restrictions sought to be enforced by the Committee and enjoined Humphrey and Haas from airing the ads in question. Disclaiming any suggestion "that the advertisements here were deceitful" (App. 11a), the court nevertheless enjoined them from being aired on the strength of DR 2-101. It rejected Humphrey and Haas' contention that the rule's blanket ban on dramatization is "more extensive than necessary" to serve any substantial state interest. "All that is prohibited," the

---

> or moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant."

ABA's Model Rules of Professional Conduct, *reprinted in* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, p. 01:166 (1985).

[7] The FTC stated, among other things, that "[t]he use of dramatizations containing characterizations, visual displays and background sound can provide a truthful, non-deceptive *and effective* means of conveying important information about legal rights and the availability and cost of legal services." FTC *amicus* brief at 15 (emphasis added). In November 1984, the Staff of the FTC's Cleveland Regional Office and the FTC's Bureau of Economics issued a report concluding that content-based and media-based restrictions on lawyer advertising inhibit the extent of advertising and result in significantly higher prices for legal services. *Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising* 126-27 (Nov. 1984). Its recommended approach is even more liberal than the ABA's Model Rule 7.2. See *id.* at 150-53, 156-57.

court stated, "are the tools which would manipulate the viewer's mind and will." (App. 13a.)[8]

The court also rejected Humphrey and Haas' contention that DR 2-101's ban on "dramatic" voices and "self-laudatory" statements is impermissibly vague. It did so merely by remarking that the phrase "nondramatic voice" is "a simple [one] which we think is commonly understood" (App. 14a), and by noting that "[t]he dictionary meaning of 'laudatory' is 'expressing praise.' " (*Id.*)

Two justices dissented, finding it "undisputed that the effect of these limitations on technique is to substantially diminish the effectiveness of any television advertising." (App. 15a.) The dissenters stressed that the Committee's own expert had testified that dramatization is not inherently misleading, and that the ads in fact were not misleading to the survey group. (App. 16a.) They disputed the majority's conclusion that "because television is the medium, a mere *chance* of deceit is sufficient" to sustain the restrictions at issue. (App. 17a.) They pointed out that this Court's statements recognizing the value of fostering rational, intelligent, and voluntary decisionmaking were meant "to expand the scope of lawyer advertising, not to throttle it." (App. 21a.)

---

[8] The court also seemed to accept the Committee's assertion — made for the first time in its brief but without support in the evidentiary record — that, "in the medium defendants chose," the ads could "mislead people into believing that pursuing the listed cases is a cost-free venture," and might cause some viewers to infer that Humphrey and Haas were more experienced than they in fact were. (App. 11a.) The court did not explain how "*the medium defendants chose*" was responsible for either supposed misrepresentation, or on what basis the court accepted the Committee's claims.

5. The Iowa Court's Decision on Remand

Humphrey and Haas sought review of the Iowa Supreme Court's September 1984 decision and on June 10, 1985, this Court vacated the Iowa court's judgment (105 S. Ct. 2693) and remanded the case for further consideration in light of *Zauderer* v. *Office of Disciplinary Counsel,* 105 S. Ct. 2265 (1985).[9] On remand, Humphrey and Haas argued that the logic of this Court's decision invalidating Ohio's blanket ban on illustrations in print advertising fully applied to bans on dramatization in broadcast advertising – that a generalized fear of audience "manipulation" could no more justify "broad prophylactic rules" here than in *Zauderer* and that, as there, the possibility of policing abuses on a case-by-case basis made the prophylactic approach taken by Iowa untenable. See *Zauderer,* 105 S. Ct. at 2280-81.

Nevertheless, the Iowa court reaffirmed its initial decision sustaining DR 2-101(B), "find[ing] nothing in the *Zauderer* holding at variance with our prior decision." (App. 26a.) The Iowa court reaffirmed its view that the manipulative capabilities of electronic media advertising justified the prophylactic approach embodied in DR 2-101 (B), and it suggested that the potential use of television for "crass personal promotion" by lawyers eager "to improve their image" also justified the rule's proscriptions. (App. 31a-33a.) The only "harm" that it identified in discussing the manipulative capabilities of Humphrey and Haas' ads, however, was the possibility that some viewers might

---

[9] Justice Rehnquist and Justice O'Connor would have noted probable jurisdiction and set the case for oral argument. 105 S. Ct. 2693.

be prompted to "grab the phone and make a call" without giving the matter sufficient reflection. (App. 31a.)[10]

Justice Larson, joined by Justice McCormick, again dissented. He noted, among other things, that problems of policing could be met "by requiring copies of a telecast or broadcast to be kept for a specified period of time," as several states require, and as ABA Model Rule 7.2(b) provides (App. 48a), and he stressed the state's lack of justification for its "outright ban" on dramatization (App. 50a). "A prophylactic rule, aimed at preventing possible abuses in some cases by imposing a ban for all cases, has been rejected by the Supreme Court." (App. 49a, citing *Zauderer.*)[11]

Although the majority went out of its way to "deny that [its] rule amounts to a blanket ban, in the sense proscribed by *Zauderer*" (App. 33a), the rule — and the court's decision sustaining it — have effectively outlawed television advertising by lawyers in Iowa.[12]

---

[10] The court lost only one member of its original majority, Justice Uhlenhopp, who concluded that "the rules which defendants challenge cannot stand" in light of *Zauderer.* (App. 43a.) Chief Justice Reynoldson, concurring specially, condemned *Zauderer* itself for "endanger[ing] the capability of the courts to identify and dislodge lawyer print advertising that is false, deceptive, or misleading." (App. 41a.) Although he complained that state courts lack the resources to police "dishonest scams" even in the print media (App. 36a), he did not address the fact that at least 44 states permit what DR 2-101(B) forbids.

[11] Much of Justice Larson's dissent attacks a provision of DR 2-101(A) deleted by the court in an order entered five days before its opinion on remand was issued — a proviso forbidding lawyers to communicate any information not "specifically permitted" by rule. The questions presented by such a restriction, which Humphrey and Haas raised in their initial appeal in this case, are no longer live.

[12] See Affidavit of Norton C. Frickey, II, ¶ 6 (App. 97a-99a), prepared after the entry of the Iowa court's judgment on remand. Mr. Frickey, vice-president of the company that produced the television

THE QUESTIONS ARE SUBSTANTIAL

The Iowa Supreme Court has treated this case as though all of the rules that this Court has established for lawyer advertising in the print media are inapplicable simply because this case involves television. But television is "one of the most powerful media for getting information to the public" (ABA Comment on Model Rule 7.2(a)), and nothing in this Court's cases suggests that merely because this medium is involved all First Amendment bets are off. There may be characteristics of the electronic media that warrant special treatment, but none of the differences between television and other media support the broad prophylactic restriction upheld here. Based on nothing more than unsubstantiated fears of audience manipulability and concerns that the medium might be misused, Iowa has drastically and gratuitously limited the effective use of television by lawyers. The state may not be reconciled to the standards announced by this Court in its lawyer advertising cases or in its commercial speech cases generally; but judged by those standards, Iowa's rule — both on its face and as applied — is clearly unconstitutional. For this reason, and for the other reasons discussed below, the Iowa court's judgment cannot stand.

---

ads at issue in this case, polled the 14 largest television stations in Iowa this January and confirmed that there is virtually no television advertising by lawyers in the state. Three of the stations that he polled specifically cited DR 2-101(B) and the Iowa Supreme Court's decision as the reason. Meanwhile, according to a September 1985 report by the Television Bureau of Advertising, lawyers spent $28.2 million on television advertising nationwide in 1984 — a 58 percent increase over the previous year — and their spending increased by one-third in the first half of 1985. *TvB News*, Sept. 27, 1985, p. 1.

A. The Ban on Dramatization Violates the First Amendment on Its Face and as Applied

In sustaining DR 2-101(B)'s restriction on lawyer advertising on television to displays of what may appear in a printed advertisement, accompanied only by an off-screen "nondramatic" voice, the Iowa court disobeyed the teachings of this Court's lawyer advertising cases, *Zauderer, supra; In re R.M.J.*, 455 U.S. 191 (1982); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978); *Bates* v. *State Bar*, 433 U.S. 350 (1977). Those cases teach that a state may impose prophylactic restrictions on lawyer advertising *only* "where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive" (*R.M.J.*, 455 U.S. at 202), and "the potential abuses . . . cannot be combatted by any means short of a blanket ban." *Zauderer*, 105 S. Ct. at 2281. See *Ohralik*, 436 U.S. at 466; *R.M.J.*, 455 U.S. at 203, 206-07.

There is no claim that the ads here were false, misleading, or deceptive. To the contrary, the Committee's expert witness specifically testified that the ads were not in fact misleading or deceptive, and the Iowa Supreme Court itself disclaimed any suggestion "that the advertisements here were deceitful." (App. 11a.)[13] The Committee's expert testified, moreover, that he found nothing inherently

---

[13] The only actual "harm" that the Iowa court identified was the possibility that the dramatization in Humphrey and Haas' ads might prompt some viewers to "grab the phone and make a call" without giving the matter due reflection. (App. 31a.) Even if this were so, it could not justify a ban on a means of expression shown to be so critical in attracting viewer attention. Viewers would not call Humphrey and Haas "merely to ascertain if they have a clean bill of legal health." *Bates*, 433 U.S. at 374.

misleading or deceptive in the use of dramatization, and he conceded that dramatization is effective in television advertising precisely because it "involve[s] and interest[s] the viewer." (Tr. 276.) Thus, the question presented is whether the state may enforce a prophylactic rule to enjoin Humphrey and Haas from airing *their* ads on the theory that *other* dramatized television ads *might* be deceptive. As *Zauderer* confirmed, however, the First Amendment permits no such prophylactic rule.

The Iowa Supreme Court upheld DR 2-101(B)'s prohibition on the basis of its unsubstantiated belief that television dramatization "manipulate[s] the viewer's mind and will" – despite this Court's admonition that "commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental.' " *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 92 n.6 (1977); *Bates,* 433 U.S. at 374-75. Although it hinted that it considers the task of policing electronic media advertising unmanageable (App. 30a-31a & n.2), it offered no "evidence or authority" for this view (*Zauderer,* 105 S. Ct. at 2281); and the practice of the other states – and the approach embodied in the ABA's Model Rule 7.2 (b) – belies this concern.[14] In striking down Ohio's illustration

[14] At least 36 states require lawyers to retain copies of the ads they air and some require lawyers to make these copies available to state authorities after airing. See Ala. Temp. DR 2-102(B); Alaska DR 2-101(D); Ariz. ER 7.2(b); Ark. R. 7.2(b); Cal. R. 2-101(E); Colo. DR 2-101(D); Del. R. 7.1(c)(3); D.C. DR 2-101(D); Fla. DR 2-101(D); Ga. R. 4-102, Stand. 7(B); Hawaii DR 2-101(D); Ill. R. 2-101(e); Ind. DR 2-101(E); Ky. SCR 3.135(6)(a)(ii); Me. R. 3.9(d); Minn. R. 7.2(b); Miss. DR 2-101(D); Mo. R. 7.2(b); Mont. R. 7.2(b); Neb. DR 2-101(B); Nev. R. 164(3); N.H. R. 7.2(b); N.M. DR 2-101(I); N.Y. DR 2-101(F); N.C. R. 2.2(B); N.D. DR 2-101(D); Ohio DR 2-101(D); Okla. DR 2-102(B); Ore. DR 2-101(C); S.C. DR 2-101(D)(1); S.D. DR 2-101(D); Tenn. DR 2-101(F); Tex. DR 2-101(E); Utah DR 2-101(A)(2); Va. DR 2-101(B); Wash. RPC 7.2(b). See also ABA Model Code DR 2-101(D).

ban in *Zauderer*, this Court in fact cited a *television* case for the proposition that advertising abuses in "the visual media" may be, and therefore must be, policed on a case-by-case basis. 105 S. Ct. at 2281 (citing *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965)).[15]

The Iowa court *may* have upheld DR 2-101(B) on the supposition that the likely viewers of lawyer advertising on television "are ordinarily of a lower intellectual category and [thus] less able to make an objective conclusion from something that is passed by them in dramatic form." (See p. 6, above.) But this Court has squarely rejected restrictions premised on the assumption "that the public is not sophisticated enough to realize the limitations of advertising." *Bates, supra*, 433 U.S. at 374-75. It has refused to restrict lawyer advertising when the restriction "rests on an underestimation of the public." *Id.* "If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." *Id.* at 375.

Nor is there any foundation in the First Amendment for justifying DR 2-101(B)'s ban on the ground that dramatization appeals to the "emotions" rather than "reason."[16]

---

[15] The Iowa court's concern that dramatization may facilitate "crass personal promotion" by lawyers (App. 32a-33a) is likewise insufficient to sustain DR 2-101(B)'s ban. This Court rejected a comparable justification in *Bates*, 433 U.S. at 368-72, and in any case the state does not need a blanket ban on dramatization to avoid the specific form of promotion with which the majority seemed to be concerned — celebrity endorsements.

[16] DR 2-101(A) includes a separate injunction against lawyer advertisements that "appeal to the emotions" (App. 58a), whatever this phrase may mean. Cf. *Thomas* v. *Collins*, 323 U.S. 516, 535 (1945); *Primus*, 436 U.S. at 431-32.

As the evidence in this case demonstrates, drama can facilitate effective communication by capturing a viewer's attention through a personal appeal to the viewer's needs — an approach that the Iowa court condemned as "manipulative" — while viewers may be more easily misled by advertising that purports to be "objective" than by advertising that makes no secret of its commercial aims. Dramatization, like the use of illustrations or pictures in *Zauderer,* "serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly." 105 S. Ct. at 2280. The Iowa Supreme Court believed that DR 2-101(B) draws a permissible line "between what informs the public and what promotes the lawyer" (App. 12a), but as Justice Larson observed in dissent, the rule is in fact "a prescription for dullness" — one that "substantially diminish[es] the effectiveness of any television advertising" (App. 15a).

The Iowa court, both in its initial decision (App. 9a-10a), and in its decision on remand (App. 29a-30a), invoked this Court's admonition that "the special problems of advertising on the electronic broadcast media will warrant special consideration." *Bates,* 433 U.S. at 384. See also *Zauderer,* 105 S. Ct. at 2294 n.1 (O'Connor, J.). Reliance on this admonition was misplaced here. Although the broadcast media undoubtedly have "established a uniquely pervasive presence" in our lives, *FCC* v. *Pacifica Foundation,* 438 U.S. 726, 748 (1978), this alone cannot justify special restrictions on otherwise protected commercial speech. This is not a case in which a restriction on advertising in the electronic media can be justified by the government's interest in protecting innocent young minds (compare *Pacifica*), or on the ground that the product being advertised is itself reputedly harmful (compare

Capital Broadcasting Co. v. *Mitchell,* 333 F. Supp. 582 (D.D.C. 1971) (3-judge court), *aff'd mem.,* 405 U.S. 1000 (1972)). Whatever the Iowa court may believe about the manipulative capabilities of television advertising, there is simply no support in the extensive record in this case — in fact, the Committee's own evidence is to the contrary — that the use of dramatization in television advertising by lawyers is inherently misleading or deceptive so as to justify a complete prophylactic proscription.

B. The Ads Here Were Not Potentially Misleading "In the Medium Defendants Chose"

Humphrey and Haas also seek review of the Iowa court's conclusion that, "in the medium defendants chose," their ads were potentially misleading with respect to cost and quality of service. (App. 11a.) *First,* the court offered no support (and the record contained none) for its conclusion that the ads could well "mislead people into believing that pursuing the listed cases is a cost-free venture" (App. 10a-11a); nor did the court supply any explanation for its view that *television* was responsible for this supposed deception.[17] *Second,* nothing in the ads overstated Humphrey and Haas' qualifications in the fields of practice they listed; at most, the ads implied that they *were*

---

[17] We do not question Iowa's power to require appropriate disclosures where, as here, lawyers offer to handle cases on a "percentage basis." See *Zauderer,* 105 S. Ct. at 2282. But as Justice Larson noted in his initial dissent (App. 19a), no such disclosures are required under Iowa's rules. The rules, as they stood when Humphrey and Haas aired their ads, required only that lawyers offering to handle cases on a "contingent-fee" basis indicate whether fees are computed "before or after deduction of costs," and Humphrey and Haas were not charged with violating the rule requiring such a disclosure. The Iowa court subsequently added a more elaborate disclosure requirement (App. 61a), which is not at issue here.

qualified to practice in those fields, and, as the dissent stated, "there is no evidence, nor even a claim, that they were in fact not qualified." (App. 20a.)[18] Offering no discussion, the majority merely said it thought viewers *might* think Humphrey and Haas more able than they are (App. 11a); but this Court in *Zauderer* confirmed that a state may not "prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has expertise in those areas." 105 S. Ct. at 2276 n.9.

Wholly apart from the First Amendment obstacles to the Iowa court's conclusion that the ads were potentially misleading with respect to cost or quality of service, it plainly violated due process for the court to enjoin Humphrey and Haas from running their ads on this ground — or for its findings in this respect here to support possible future disciplinary action against Humphrey and Haas. The Committee's complaint did not allege that the ads were misleading in any respect, and it presented no evidence on these matters at the hearing before the commissioner. It first raised these claims in its brief to the Iowa court, obviously groping for some solid basis for the relief it had requested. Although a majority of this Court rejected a due process attack on similar maneuvering by state authorities in *Zauderer* (105 S. Ct. at 2283-84), the issue should be reconsidered here. It is intolerably per-

---

[18] Humphrey, a 1979 Drake Law School graduate, had been editor-in-chief of the law review and had clerked for a federal magistrate during law school. Haas, also a 1979 Drake Law School graduate, was also on the law review and served as student bar president. As of the summer of 1983, the two lawyers (who had formed their firm in November 1980) had handled or were handling over 150 personal injury cases, in addition to their worker's compensation cases.

nicious for state authorities, unable to muster proof of their charges in evidentiary hearings, to be permitted at the briefing stage to urge remedial action on entirely new grounds. See *id.* at 2292-93 (Brennan, J., joined by Marshall, J., dissenting in part).

C. The Ban on "Dramatic" Voices and "Self-Laudatory" Statements Also Violates The First Amendment

The Iowa court sustained DR 2-101(A)'s ban on "dramatic" voices without analysis; to it, the meaning of the term is "commonly understood," and therefore DR 2-101(A)'s ban could not be condemned as vague. Humphrey and Haas submit that the court was wrong. A ban on the use of "dramatic" voices is inherently vague, for there is no voice that cannot be considered "dramatic," and no principled basis for distinguishing between the voice that is "dramatic" and a voice that is not. Indeed, by prohibiting a lawyer from speaking in his own television ads, the rule requires a lawyer to employ an actor if he desires to have his message heard; and it is hard to imagine how an actor's voice could be regarded as anything other than "dramatic."

No test of intonation or other criterion is provided by the rule for determining when a voice is "dramatic," and the rule's prescription is thus a recipe for arbitrary and discriminatory treatment of lawyers who advertise on television. This case is a perfect illustration. There was no shouting in the ads in question; there were no histrionics. The ads involved actors playing everyday people, speaking in everyday language about everyday needs, in perfectly measured tones. If there was anything "dramatic" about their voices, neither the Committee nor the Iowa Supreme Court explained what it was.

Nor could Humphrey and Haas ever have suspected that the ads would be deemed "self-laudatory." Their ads made no claim as to the quality of their services, did not recite their credentials (although the rules permit credentials to be listed), and did not claim or suggest that the firm would render better service than other firms. If these ads were "self-laudatory," then all ads are "self-laudatory," and the ban on "self-laudatory" statements amounts to a ban on all ads. Applied to enjoin these ads on the ground that they contain "self-laudatory" statements in violation of DR 2-101(A), the rule is impermissibly vague – equivalent to the blanket advertising prohibitions held impermissible by *Bates* and its progeny.

CONCLUSION

Probable jurisdiction should be noted and the case set for briefing and argument.

Respectfully submitted,

MARK W. BENNETT
BABICH, BENNETT & NICKERSON
5835 Grand Ave.
Suite 202
Des Moines, Iowa 50312

CHARLES S. SIMS
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43d St.
New York, N.Y. 10036

CHARLES A. HORSKY*
DAVID H. REMES
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for Appellants

February 11, 1986

*Counsel of Record

85-1343

No. 85-

Supreme Court, U.S.
FILED
FEB 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MARK A. HUMPHREY AND FREDD J. HAAS,
d/b/a HUMPHREY & HAAS,
Appellants,

v.

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT
OF THE IOWA STATE BAR ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

APPENDIX TO JURISDICTIONAL STATEMENT

MARK W. BENNETT
BABICH, BENNETT & NICKERSON
5835 Grand Ave.
Suite 202
Des Moines, Iowa 50312

CHARLES S. SIMS
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43d St.
New York, N.Y. 10036

CHARLES A. HORSKY*
DAVID H. REMES
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for Appellants

*Counsel of Record

February 11, 1986

TABLE OF CONTENTS

Page

APPENDIX A – September 19, 1984, Opinion of Iowa Supreme Court 1a

APPENDIX B – November 13, 1985, Opinion of Iowa Supreme Court On Remand 25a

APPENDIX C – Notice of Appeal 56a

APPENDIX D – Iowa Code of Professional Responsibility for Lawyers

DR 2-101: Publicity 58a

DR 2-105: Description and Limitation of Practice. . 65a

APPENDIX E – Plaintiff's Petition for Injunction 71a

APPENDIX F – Defendants' Answer and Counterclaim 75a

APPENDIX G – Order of Sept. 14, 1982, Temporarily Enjoining Airing of Ads 81a

APPENDIX H – Order of Sept. 28, 1982, Appointing Commissioner to Conduct Evidentiary Hearing 83a

APPENDIX I – Commissioner's Report (filed Nov. 16, 1983) 85a

APPENDIX J – Affidavit of Norton C. Frickey, II (Jan. 28, 1986) 97a

APPENDIX A

IN THE SUPREME COURT OF IOWA

167
69088

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT
OF THE IOWA STATE BAR ASSOCIATION,
Plaintiff,

vs.

MARK A. HUMPHREY, FREDD J. HAAS,
and JAMES E. GRITZNER, d/b/a
HUMPHREY, HAAS AND GRITZNER,
Defendants.

Filed September 19, 1984

Original action.

Proceeding to enjoin lawyers from airing certain television advertisements. A counterclaim asks that our advertising rule be declared unconstitutional. INJUNCTION ISSUED.

Nick Critelli of Critelli and Sherburne, Des Moines, and Frank A. Comito of Comito and Capps, Des Moines, for plaintiff.

Mark W. Bennett of Babich, Bennett & Nickerson, Des Moines, and Wilcox & Ogden, Golden, Colorado, for defendants.

Erwin G. Krasnow and Barry D. Umansky, Washington, D.C., for amici curiae, Iowa Broadcasters Association and National Association of Broadcasters.

John W. Carley, general counsel, and William W. Jacobs, and Brenda W. Doubrava, Cleveland, Ohio, for amicus curiae, Federal Trade Commission.

Considered en banc.

HARRIS, J.

Our rule on lawyer advertising expressly prohibits television advertisements which contain background sound, visual displays, more than a single, nondramatic voice or self-laudatory statements. Believing the rule exceeded the standards outlined by the United States Supreme Court, defendant lawyers bought and aired television advertisements in clear violation of it. Plaintiff committee then brought this original action before us to enjoin the advertisements. Defendants answered and counterclaimed, asking that the rule, to the extent of the violation, be set aside as unconstitutional. We think the rule passes constitutional muster and order issuance of a permanent injunction.

The factual background can be briefly stated. In September of 1982, Des Moines attorneys Mark A. Humphrey, Fredd J. Haas, and James E. Gritzner, without seeking prior permission, aired the advertisements over a Des Moines television station for a three-day period. They had purchased the ads from a Denver corporation.

The ads were of three types. The first featured an actor and actress portraying a physician and nurse in an examination room. While the "nurse" looks at an X-ray, the "physician" says:

> We see first-hand injuries caused by the neglect of others. If you're seriously injured through the negligence of others, you should be talking to a lawyer. The choice of lawyer could be important. That's something to think about.

The second ad featured an actor portraying a printer standing in front of a press. The "printer" says:

> I suffered loss of wages, incurred staggering medical bills, and endured pain and suffering all through the negligence of others. I wasn't aware of my legal rights. I should have been talking to a lawyer.

The third featured actors portraying bowlers. The following conversation takes place at the lanes:

> Bowler 1: I've got to throw like that today; we're one man short.
>
> Bowler 2: He was injured through the negligence of others.
>
> Bowler 1: He should be talking to a lawyer.
>
> Bowler 2: The choice of that lawyer will be important.
>
> Bowler 1: That's something to think about.

In each of the advertisements, after the brief dramatization, the picture switches to a person portraying a receptionist in a law office. The name, address, phone number, and areas of practice of defendants' law firm are superimposed over the picture, and a voice says:

> If you're injured through the negligence of others, call the law firm of Humphrey, Haas & Gritzner. Cases involving auto accidents, work comp, serious personal injury and wrongful death handled on a percentage basis. No charge for initial consultation. Call now at 288-0102.

The voice repeats the phone number twice.

The television station discontinued the advertisements following a request from the ethics committee. The committee then commenced this action, requesting us to enjoin defendants from using the ads because they violate our professional canons DR 2-101 and DR 2-105. We granted a temporary injunction.

By answer and counterclaim, based on 42 U.S.C. § 1983, defendants Humphrey and Haas,[1] asserted that DR 2-101 and DR 2-105 violate the first and fourteenth amendments of the United States constitution. They also asserted the phrase "nondramatic voice" in DR 2-101(B) and the phrase "self-laudatory" in DR 2-101(A) are void for vagueness under the first and fourteenth amendments.

In July 1983, an evidentiary hearing was held before the Honorable C. Edwin Moore. We appointed senior judge Moore as commissioner of this court to conduct the hearing and summarize the evidence. The matter is before us on the record made before him.

Prior to 1977 Iowa's canons of ethics, in common with most such canons, strictly forbade lawyer advertising. The prohibition for the most part was never questioned. Indeed, prior to relatively recent times, the United States Supreme Court viewed regulation of commercial speech as tantamount to the regulation of a business activity: wholly permissible and without the protection of the first amendment. *Valentine v. Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed.2d 1262 (1942).

Commercial free speech, however, was recognized by the court in *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). The right was first applied for lawyers in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), which held that no longer could a state absolutely prohibit lawyer advertising. It could only regulate it. The *Bates* opinion was later explained by the court in the case of *In re R.M.J.*, 455 U.S. 191, 199-202, 102 S.Ct. 929, 935-37, 71 L.Ed.2d 64, 71-74 (1982):

---

[1] Gritzner had withdrawn from the firm by this time and, in October 1982, we dismissed the action as to him.

The *Bates* Court held that . . . lawyer advertising was a form of commercial speech, protected by the First Amendment and that 'advertising' by attorneys may not be subject to blanket suppression. [Citing *Bates*]

More specifically, the *Bates* Court held that lawyers must be permitted to advertise the fees they charge for certain 'routine' legal services. The court concluded that this sort of press advertising was not 'inherently' misleading, and therefore could not be prohibited on that basis. The court also rejected a number of other justifications for broad restrictions on advertising including the potential adverse effect of advertising on professionalism, on the administration of justice, and on the cost and quality of the legal services, as well as the difficulties of enforcing standards short of an outright prohibition. None of these interests was found to be sufficiently strong or sufficiently affected by lawyer advertising to justify a prohibition.

But the decision in *Bates* nevertheless was a narrow one. The Court emphasized that advertising by lawyers still could be regulated. False, deceptive, or misleading advertising remains subject to restraint, and the court recognized that advertising by the professions poses special risks of deception—'[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant and other advertising may be found quite inappropriate in legal advertising.' [Citing *Bates*] The Court suggested that claims as to quality or in-person solicitation might be so likely to mislead as to warrant restriction. And the Court noted that a warning or disclaimer might be appropriately required, even in the context of advertising as to price, in order to dissipate the possibility of consumer confusion or deception. '[T]he bar retains

> the power to correct omissions that have the effect of presenting an inaccurate picture, [although] the preferred remedy is more disclosure, rather than less. [Citing *Bates*]
>
> In short, although the Court in *Bates* was not persuaded that price advertising for 'routine' services was necessarily or inherently misleading, and although the Court was not receptive to other justifications for restricting such advertising, it did not by any means foreclose restrictions on potentially or demonstrably misleading advertising. Indeed, the Court recognized the special possibilities for deception presented by advertising for professional services. The public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the 'product' renders advertising for professional services especially susceptible to abuses that the States have legitimate interest in controlling.
>
> Thus, the Court has made clear in *Bates* and subsequent cases that regulation—and imposition of discipline—are permisssible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive. *Id.*

Other cases, in which the court considered restrictions on lawyer advertising, were *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978) (political expression or association by lawyer working for American Civil Liberties Union called for "exacting scrutiny applicable to limitations on core first amendment rights" in reviewing lawyer solicitation rule) and *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) (lower level of judicial scrutiny required for rule prohibiting in-person solicitation by lawyer).

To summarize the foregoing cases, the court set aside, as a special category, advertising which is misleading or which experience has proved to be inherently misleading. Commercial speech in this category can be appropriately restricted. Misleading advertising can be prohibited. Other lawyer advertising can be regulated if the state first demonstrates a compelling interest. But any restrictions must be narrowly drawn, and the state may regulate only to the extent regulation furthers substantial state interest.

Commercial free speech challenges to advertising rules are to be reviewed under the four-part analysis specified in *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341, 351 (1980). As we shall point out, a special problem is recognized in advertising by way of the electronic media.

We took some care in responding to the *Bates* opinion. We asked the ethics committee [2] to conduct public hearings, to investigate the matter of lawyer advertising, and to file with us a report with recommended advertising rules for the profession. After hearings and considerable study, the committee filed its report with us on January 18, 1980. Following our own extended study and consideration, we entered an order on May 6, 1980, which in effect adopted the committee's report and recommendations.

Despite objection voiced before the committee and later carefully considered by us, the rules contain the provision challenged here. DR 2-101 specifies in considerable detail what advertising is and is not prohibited. DR 2-101(A) generally prohibits:

---

[2] The committee on professional ethics and conduct of the Iowa state bar association. Seven lawyer members of the committee are appointed, subject to our confirmation, by the Iowa state bar association. We appoint two lay members of the committee. See Iowa Court Rule 118.2.

> [A]ny form of public communication which contains a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement, which contains any statement or claim relating to the quality of . . . legal services, which appeals to the emotions, prejudices, or likes and dislikes of a person, or which contains any claim that is not verifiable . . . .

DR 2-101(B) separately deals with newspapers or periodicals, telephone directories, radio, and television. The rule lists 19 items thought to be useful to the public (names, fields of practice, office and telephone answering service hours, hourly fee rate, fixed fees, range of fees for specific legal services, date and place of bar admissions, various licenses and memberships, etc.). Only the listed items may be communicated to the public. As to television advertising the rule provides:

> The same information, in words and numbers only, articulated by a single non-dramatic voice, not that of the lawyer, and with no other background sound, may be communicated on television. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications on radio and television, to the extent possible, shall be made only in the geographical area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides. Any such information shall be presented in a dignified manner . . . .

I. Our advertising rule encompasses the "safe harbor" concept. The listed items may be communicated by the manner specified. A lawyer who feels constrained by the rules may petition to have them changed. The committee, as our commissioner acting on its own motion or upon the request of any Iowa lawyer, is to consider proposed amendments to the advertisement rules. *See* DR 2-101(D). Any recommended changes are to be consid-

ered by us and a prompt appeal to us is provided from the committee's rejection of requested changes. *Id.*

This proceeding, of course, is no such appeal. Rather than proposing rule changes which would authorize their television advertisements, defendants chose to violate the rule and defend their violation by challenging its constitutionality. Accordingly, we are dealing only with the rule's constitutionality, not with its wisdom. It should be scarcely necessary to point out that any lawyer asserting the wisdom of a rule change, should present the proposal to the committee under the procedure we have provided. The professional disciplinary system would be in utter chaos if violations could be defended on the ground the lawyer involved could think of a better rule.

Because the challenge is limited to its constitutional basis, we have set aside a number of criticisms that go only to the wisdom of the rule.

II. The United States Supreme Court seems not to have specifically addressed the use of sound, visual displays, and dramatization, but seems to clearly have recognized the electronic use of those devices as potentially misleading. It has referred to the "special problems" of television advertising:

> [T]he special problems of advertising on the electronic broadcast media will warrant special consideration. *Cf. Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.C. 1971), aff'd sub nom. *Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000, 31 L.2d 472, 92 S.Ct. 1289 (1972).[3]

---

[3] The case cited by the Court contains the following statement:

> The fact is that there are significant differences between the electronic media and print. As the court noted in *Banzhaf* [*v. F.C.C.*, 132 U.S. App. D.C. 14, 405 F.2d 1082, 1100-01 (1968), cert. den., 396 U.S. 842], written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are 'in the air'. In an age of omnipresent radio, there scarcely breathes

Bates, 433 U.S. at 384, 97 S.Ct. at 2709, 53 L.Ed.2d at 836.

In several cases, the court has described the broadcast media as uniquely pervasive or intrusive. *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 748, 98 S.Ct. 3026, 3039, 57 L.Ed.2d 1073, 1093 (1978) ("the broadcast media has established a uniquely pervasive presence in the lives of all Americans."); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 127, 93 S.Ct. 2080, 2098, 36 L.Ed.2d 772, 798 (1973) ("viewers constitute a 'captive audience.'"); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501, 101 S.Ct. 2882, 2889, 69 L.Ed.2d 800, 811 (1981) ("Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses, and dangers' of each method.")

It is in view of these "special problems" that the committee argues two ways in which it feels the public might be misled[4] by defendant's television ads. First,

---

a citizen who does not know some part of a leading cigarette jingle by heart. . . . It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.

Capital Broadcasting Co., 333 F. Supp. at 586.

[4] The proposed model rule of professional conduct 7.1 defines a "false or misleading" communication as follows:

A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

the ad states that certain cases are handled on a percentage basis and there is no other charge for initial consultation. The committee thinks these statements mislead people into believing that pursuing the listed cases is a cost-free venture. It points out that the ads are "conspicuously" silent with regard to payment of expert witness fees and of other costs of litigation. The committee asserts defendants, like the defendant in *Ohralik v. Ohio State Bar Association*, 436 U.S. at 467, 98 S.Ct. at 1924, 56 L.Ed.2d at 461, used the contingency fee as a lure:

> He emphasized that his fee would come out of the recovery, thereby tempting the young women with what sounded like a cost-free and therefore irresistible offer.

The second way the committee thinks defendant's ads are misleading stems from the statements which are thought to be self-laudatory comment on the advertisers' expertise. The committee argued that the firm's experience did not match their representation:

> Defendants had little in the way of experience when the commercials were broadcast. After graduation from law school, Mr. Humphrey had tried six cases, the nature of which are unknown, all while under the supervision of another Des Moines law firm. Mr. Haas had virtually no trial experience. Together, defendants Humphrey and Haas had only tried one case.

Without suggesting that the advertisements here were deceitful, we do agree with the committee that, in the medium defendants chose, the public could well be misled by them. We think the situation is exactly what the United States supreme court had in mind when it referred to the "special problems" in electronic media advertising. We think the challenged rule falls clearly within the area left to us by the *Bates* opinion.

The court has said that the state can regulate those types of advertising which result in instrusion, intimidation, overreaching, or undue influence. *See Ohralik*, 436 U.S. at 462, 98 S.Ct. at 1921, 56 L.Ed.2d at 457. A state can regulate advertisements which are inherently likely to deceive, or which the experience has proven to be subject to abuse. *See R.M.J.*, 455 U.S. at 202-03, 102 S.Ct. at 937, 71 L.Ed.2d at 73-74.

The court in *Bates* condemned those advertising rules which amounted to restrictions on the flow of "relevant information needed to reach an informed decision." *Bates*, 433 U.S. at 374, 97 S.Ct. at 2704, 53 L.Ed.2d at 829-30. The committee's position is that the *Bates* rationale does not apply to irrelevant information. Information is not relevant if it makes no contribution to informed decision making. In other words, prohibition of such information does not impede, and in fact advances, the fostering of rational decision making and maintaining of the bar's professionalism.

We think the ads here would not aid the public in making the informed decision which is subject to the protection recognized in *Bates*. This was the holding in *Bishop v. Committee on Professional Ethics*, 521 F. Supp. 1219, 1229 (S.D. Iowa 1981), which rejected a similar challenge to our rule, as it relates to television advertising.

The gist of the *Bishop* holding, as we understand, is that electronic promotional advertising can be prohibited. This was our understanding when we considered and adopted our advertising rule. It is no insult to the advertising industry, or to the electronic media, to believe that, when their efforts are combined on behalf of a lawyer, a line can and should be drawn between what informs the public and what promotes the lawyer. We thought the cases we have discussed allowed, even encouraged, us to draw such a line and we carefully

tried to draw it in such a way that the public would be informed and not misled. We think the rule is constitutional.

III. It is perhaps unnecessary, under our analysis, to explore the state interests involved. We do think the state interests in the challenged provisions of the rule are substantial. One such interest was recognized in *Bates*: fostering rational, intelligent, and voluntary decision making in determining the need for legal services and selecting a lawyer. *Bates*, 433 U.S. at 377, 97 S.Ct. at 2705, 53 L.Ed.2d at 831. *See also R.M.J.*, 55 U.S. at 200-01, 101 S.Ct. at 936, 71 L.Ed.2d at 72-73. We think the rule directly advances the state interest by aiding the citizen in making an intelligent selection of counsel.

IV. We reject defendants' contention that the prohibition against background sound, visual displays, multiple dramatic statements, and self-laudatory statements is more extensive than necessary to serve the state interests. All that is prohibited are the tools which would manipulate the viewer's mind and will.

Neither do we agree with defendants' criticism of what they call our "laundry list" approach. We specifically allowed dissemination of all information necessary to assist the public in seeking and selecting counsel. As previously mentioned, a procedure is in place for considering any suggested additions of useful information.

Neither do we find merit in defendants' vagueness defense. In their brief, defendants fail to mention why they believe "nondramatic voice" and "self-laudatory" are vague phrases. In its amicus brief, however, *F.T.C.* asserts that all advertisements are, to some degree, self-laudatory, and that all defendants' ads are no more self-laudatory than the information allowed under the rule. The commissioner also fears the prohibition against "self-laudatory" statements sets up an inherently subjec-

tive standard that can result in inconsistent treatment of identical conduct.

We explained the vagueness standard in *Incorporated City of Denison v. Clabaugh*, 306 N.W.2d 748, 751-52 (1981):

> A civil statute is unconstitutionally vague under the due process clause of the fourteenth amendment of the United States constitution when its language does not convey a sufficiently definite warning of proscribed conduct, when measured by common understanding or practice. [Authority.] Thus, when persons must necessarily guess at the meaning of the statute and its applicability, the statute is unconstitutionally vague. [Authority.] However, '[a] statute is not vague when the meaning of the words used can be fairly ascertained by reference to similar statutes, other judicial determinations, referenced common law, or to the dictionary, or if the words themselves have a common and generally accepted meaning.' *State v. Donner*, 243 N.W.2d 850, 853 (Iowa 1976).

"Nondramatic voice" is a simple phrase which we think is commonly understood. The dictionary meaning of "laudatory" is "expressing praise." Websters New International Dictionary, third ed. (1964). The terms are not vague.

It is unnecessary to discuss defendants' counterclaim which asks that we declare our rule to be unconstitutional. Because we find that the rule withstands defendants' constitutional challenge, we order that a writ issue, restraining defendants from continuing to place the advertisements.

WRIT ISSUED.

All justices concur except Larson and McCormick, JJ., who dissent.

LARSON, J. (dissenting).

I believe the laundry list of allowable advertising *content* is unnecessarily restrictive because it prohibits dissemination of basic information necessary for an informed judgment about the selection of an attorney and the protection of basic legal rights. As to the restrictions on *technique*, these are in fact a prescription for dullness, prohibiting all background music, dramatization, and other methods of stimulating viewer interest. It is undisputed that the effect of these limitations on technique is to substantially diminish the effectiveness of any television advertising. The combined effect of the rules is to inhibit dissemination of relevant information without a showing of a substantial state interest. This violates the free speech clause of the first amendment.

As the outset, we as lawyers must accept the reality that despite this perceived assault on the "professionalism" of the bar, and despite the exemption of commercial speech previously existing, lawyer advertising is here, and it is here in constitutional dimensions. It is here because of the Supreme Court interpretation of the free speech clause of the first amendment of the United States Constitution in both *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) and *In re R.M.J.*, 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982).

First amendment protection of commercial speech, while not as extensive as that accorded other forms of speech, is nevertheless broad in its reach, and the principles to be applied are quite straightforward. *Central Hudson* sets forth the four-part test we must apply:

> (1) Do the ads concern an unlawful activity, or are they misleading? If the answer to either question is in the affirmative, first amendment protection is not allowed. If the answers to both questions are in the negative, the following tests apply:

(2) Is the governmental interest, asserted through these disciplinary rules, substantial?

(3) Does this regulation directly advance that governmental interest?

(4) Is the regulation more extensive than necessary to serve that interest?

See Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341, 351 (1980).

Although the majority recognizes the *Central Hudson* test, the opinion does not make it clear whether first amendment protection is unavailable for the defendant's advertisements because they are "misleading" under the first segment of the test or whether there is a substantial state interest which is directly advanced by those regulations under steps two and three of the *Central Hudson* test. I believe the majority is on shaky ground under either approach.

I. *Are the Advertisements "Misleading."*

It is interesting to note that the Committee's own expert, Dr. Haynes, testified the ads were not in fact misleading, and that his survey group, which had actually viewed the ads, agreed. The Committe's argument that they are deceitful is, in fact, an argument that they *might* mislead the viewer with respect to possible responsibility for court costs and with respect to the extent of the experience of Humphrey and Haas, which the Committee argues is minimal.

The majority specifically concludes that the *chance* of deceit is sufficient to deny first amendment protection "[w]ithout suggesting that the advertisements here were deceitful" because "in the medium defendants chose [television] the public could well be misled by them." It improvises on the four-prong test of *Central Hudson* by

saying that because television is the medium, a mere *chance* of deceit is sufficient. That theory, however, is not suggested in *Central Hudson* nor in any other case.

The majority draws support for this theory solely from language taken from *Bates* which, the majority says "seems to clearly have recognized the electronic use of [sound, visual displays, and dramatization] as potentially misleading." *Bates*, however, did not say there was more potential for abuse in electronic advertising, only that "the special problems of advertising on the electronic media will warrant special consideration." *Bates*, 433 U.S. at 384, 97 S.Ct. at 2709, 54 L.Ed.2d at 836. Neither *Bates* nor the case it cited on this issue even mentioned any increased potential of the electronic media for misleading the public. *See Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.C. 1971), *aff'd sub nom, Capital Broadcasting Co. v. Kleindiest*, 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472 (1972). *Capital Broadcasting* illustrates the sort of "special problems" referred to in *Bates* in connection with television advertising. *Capital Broadcasting* justified a different rule for television advertising, not because it was likely to be misleading, but because it was nonselective. In effect, television was thought to be reaching too *large* an audience; children, who were being exposed to intensive cigarette advertising, were considered likely to be adversely affected by it.

Television advertising by lawyers, on the other hand, cannot be considered objectionable merely because television is nonselective, and the rationale of *Capital Broadcasting* is inapposite. Yet, the majority seizes on *Bates*' "special problems" language used in connection with the Court's reference to *Capital Broadcasting* as authority for its broad assertion of power in restricting television advertising. I do not think this language of *Bates* was intended to grant such a broad exercise of state power.

I believe the Supreme Court has actually made it clear that regardless of the medium used, advertising must be

more than "possibly" misleading in order to be denied first amendment protection. In *In re R.M.J.*, 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982), the Court addressed the matter of untruthful advertising:

> [T]he Court has made clear in Bates and subsequent cases that regulation—and imposition of discipline—are permissible where the particular advertising is inherently *likely* to deceive or where the record indicates that a particular form or method of advertising *has in fact* been deceptive.

Id. at 202, 102 S.Ct. at 937, 71 L.Ed.2d at 73-74. (Emphasis added.)

A further indication that more than a possibility of deceit would be required is found in *R.M.J.*'s discussion of two prior cases in which first amendment protection was denied for professional advertising or solicitation. In discussing *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), the *R.M.J.* Court said "the possibility of 'fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct' was *so likely* in the context of in-person solicitation" that such solicitation could be prohibited. *R.M.J.*, 455 U.S. at 202, 102 S.Ct. at 937 L.Ed. 2d at 74. (Emphasis added.) Similarly, in discussing *Friedman v. Rogers*, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed. 2d 100 (1979), the Court noted that first amendment protection on the use of trade names by Texas optometrists could be prohibited "in view of the *considerable history* in Texas of deception and abuse worked upon the consuming public through the use of trade names." *R.M.J.*, 455 U..S at 202, 102 S.Ct. at 937, 71 L.Ed.2d at 74. (Emphasis added.)

The Court in *R.M.J.*, after discussing *Ohralik* and *Friedman*, summarized the rule: "[W]hen the particular content or method of the advertising suggests that it is

inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions." *R.M.J.*, 455 U.S. at 203, 102 S.Ct. at 937, 71 L.Ed.2d at 74. *R.M.J.* involved printed advertising. There is no indication that a different rule would apply to television advertising, yet the Committee does not even attempt to meet the test.

Even if I were to accept the plaintiff's possibility-of-deceit argument, which I do not, I believe the record here still falls short of establishing any reasonable likelihood that this would happen.

The majority points to two aspects of the advertisements which it claims "might well be" misleading: (1) the statement that certain cases will be handled "on a percentage" basis without mention of court costs might be construed as an offer of "cost-free" services according to the majority; and (2) the advertisements could be construed as a claim of expertise by Humphrey and Haas which in fact is belied by their lack of actual experience.

As to the cost issue, it is true the advertisements state that fees will be assessed on "a percentage basis" (without stating a percentage rate) but do not mention court costs. To require a statement concerning costs, however, would go beyond our own advertising rules, which merely require it in the event the ad specifies a contingent fee rate. Even then the advertisement is merely required to disclose "whether percentages are computed before or after deduction of costs." *See* DR 2-101(C). Here, the defendants represent no contingency rate at all, only that the fee would be "a percentage." Significantly, also, DR 2-101(C) allows a lawyer to advertise "[f]ixed fees or range of fees for specific legal services" without a caveat about costs, despite the fact that many of the "specific legal services" listed, such as dissolutions, bankruptcies, and several real estate services, would necessarily involve either court costs or recording fees.

The Supreme Court, moreover, has apparently not considered a cost caveat to be necessary for a full disclosure on fees. *See, e.g., In re R. M. J.*, 455 U.S. at 194, n.3, 102 S. Ct. at 933, n.3, 71 L. Ed. 2d at 68, n.3 (fees for "routine" legal services may be advertised; no mention of court costs).

As a practical matter, the subject of court costs, affected by the extent of discovery and a myriad of other factors, is so complex as to make it impractical to explain in a thirty-second advertisement. (Testimony showed a thirty-second ad to consist of only about sixty words). Furthermore, any lack of understanding about this matter, or any other matter relevant to the terms of a lawyer's employment, would logically be resolved at the initial conference, which, in this case, was advertised as being free of cost. *See Bates*, 433 U.S. at 373, n.28, 97 S. Ct. at 2704, n.28, 53 L. Ed.2d at 829, n.28 (1977).

I believe the majority's conclusion that the advertisements overstated the lawyers' qualifications is also without support in the evidence. While the record revealed that these were young lawyers just developing a law practice, there is no evidence, nor even a claim, that they were in fact not qualified. While they lacked the experience of many older lawyers, they did have some experience in each of the areas listed, and the evidence showed they possessed above average academic qualifications. The Committee and the majority seem to equate qualification with experience, and there is simply no direct correlation. I believe the claim that this could "well be" false and misleading is plainly without support.

II. *The Public Interest Argument.*

If advertising concerns a lawful activity and is not misleading under the *Central Hudson* test, a state may restrict only if (1) the governmental interest is substantial; (2) the regulation directly advances that governmental interest; and (3) the restriction is no more ex-

tensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566, 100 S. Ct. at 2350, 65 L. Ed. 2d at 351. I believe the restrictions imposed in this case fail that test because the Committee has not made the necessary showing of a substantial state interest.

The majority concludes that the state-interest issue is only secondary, stating "[i]t is perhaps unnecessary, under our analysis, to explore the state interests involved." The "analysis" which the majority says makes it unnecessary to address the issue is apparently that the advertisements are actually misleading under the first prong of the *Central Hudson* test, therefore not subject to any first amendment protection regardless of a supporting state interest. *See Central Hudson*, 447 U.S. at 563, 100 S. Ct. at 2350, 65 L. Ed. 2d at 349.

As I have already noted, however, the ads are not even claimed to be actually misleading, and any risk of possible misleading is minimal—certainly not sufficient to justify denial of first amendment protection without even considering the state interest. I believe, in fact, analysis of the state interest is the pivotal issue in this case.

What is that interest? The majority identifies only one in support of the restrictive rules: "fostering rational, intelligent, and voluntary decision making in determining the need for legal services and selecting a lawyer," citing *Bates* and *R. M. J.*

It is interesting, however, that both *Bates* and *R. M. J.* used this language to expand the scope of lawyer advertising, not to throttle it.

Moreover, there is a strong state interest in what is essentially a by-product of attorney advertising. This is the need for members of the public to be informed about the nature of their legal rights and the means of pursuing them. As the Supreme Court has said, it would be unusual to meet the need for more informed judgments by reducing the scope of available information:

> Advertising does not provide a complete foundation on which to select an attorney. But it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. . . . Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on for benefits of public ignorance.

Bates, 433 U.S. at 374-75, 97 S. Ct. at 2704, 53 L. Ed. 2d at 829-30. In providing information for the formation of an informed judgment, it seems to me that it is preferable to provide an excess of information, rather than too little. Viewers are sophisticated enough to accept or reject it as they see fit.

Broad areas of information necessary to an informed judgment are prohibited by our rules. In the present case, the advertisements inform the viewer that, if one is hurt through the negligence of others, he should see a lawyer and imply that recovery for losses might be obtained. One advertisement points out that legal rights may be lost by failure to talk to a lawyer. These and many other types of information including, most obviously, such matters as statutes of limitation, the early filing requirements of our tort claims act, and the problems of uninformed releases of claims are all of great importance to an informed decision of the viewer. Yet these, and all other items of general information on the rights of litigants are prohibited by the rules, because they are not included in the "laundry list" of contents.

I believe the state interest served by this type of information far outweighs any interest in denying it. *Bates* and *R. M. J.* make it clear that present methods of de-

livering legal services are ineffective. In *Bates*, the court said:

> The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community: Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney. Indeed, cynicism with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients.

Id. at 370-71, 97 S. Ct. at 2702, 53 L. Ed. 2d at 827-28.

American Bar Association statistics cited in *Bates* show that the "middle 70% of our population is not being reached or served adequately by the [legal] profession." *Id.* at 376, 97 S. Ct. at 2705, 53 L. Ed. 2d at 831.

In Iowa, a recent study shows that there is only one Legal Services Corporation lawyer for each 8700 eligible recipients. Equal Access to Services Study, Legal Services Corporation of Iowa (1984). Moreover, many of the traditional points of contact between lawyers and potential clients, such as the country club or Rotary Club are simply not viable sources of preliminary legal information for a great segment of our population.

I believe the thrust of the Rule 2-101 laundry list largely misses the point of public information. What difference does it make to potential litigants when the lawyer was born, the legal fraternities, societies or bar association of which the lawyer is a member (especially since membership usually is not based on any required level of professional competency) or whether the lawyer has had military service? This is relatively unimportant information, in view of the possibility that litigants might lose their claims, through lack of information, to a statute

of limitation or other legal impediment as to which they remain ignorant.

I believe our rules, insofar as they ban advertising which is false or misleading, are valid. This is basically the model rule of the American Bar Association [1] and the rule of most states. Beyond that, I believe the additional restrictions of our rules fail the state interest test and are therefore invalid.

I believe, moreover, that the model rule illustrates the "less restrictive" means of control alluded to in *Central Hudson*, and that the Committee has failed to show that they would not be effective here. For that additional reason, I believe the restrictions imposed here fail the test of constitutionality.

I would dissolve the injunction and grant judgment for the defendants on their counterclaim.

McCormick, J., joins this dissent.

---

[1] RULE 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

APPENDIX B

IN THE SUPREME COURT OF IOWA

207
69088

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Plaintiff,

vs.

MARK A. HUMPHREY, FREDD J. HAAS, d/b/a HUMPHREY AND HAAS,
Defendants.

Filed November 13, 1985

Original action on remand from the United States Supreme Court.

Proceeding to enjoin lawyer from airing certain television advertisements. WRIT ISSUED.

Nick Critelli, Des Moines, and Frank A. Comito, Des Moines, for plaintiff.

David H. Remes of Covington & Burling, Washington, D.C., and Mark W. Bennett of Babich, Bennett & Nickerson, Des Moines, for defendants.

Considered en banc.

HARRIS, J.

After we filed our decision in this matter, *Committee on Professional Ethics* v. *Humphrey,* 355 N.W.2d 565 (Iowa 1984), defendants took an appeal to the United States Supreme Court. Certiorari on the appeal was pending until after that Court filed its opinion in *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. ____, 105 S. Ct. 2265, 85 L.

Ed. 2d 652 (1985). Thereafter, the United States Supreme Court vacated our judgment in this case and remanded the matter to us for further consideration in light of *Zauderer*.

In compliance with this mandate we invited the parties to submit briefs dicussing "the effect, if any, of the *Zauderer* decision on this case." The matter was submitted to this court, sitting en banc, upon further oral arguments. The factual background, the issues presented, and the authorities prior to *Zauderer* were set out in our prior opinion and need not be again detailed here. Our present task is only to search for any impact by *Zauderer* which might lead to a different result. We find nothing in the *Zauderer* holding at variance with our prior decision. After further consideration, we again order that a writ issue restraining defendants from continuing to place the television advertisements.

Zauderer was an Ohio lawyer who first violated his state's professional rules by placing an advertisement in a local paper. It stated he represented drunk drivers and that his "[f]ull fee would be refunded if the person charged were convicted." Zauderer ran another ad in 36 Ohio newspapers which pictured a line drawing of a Dalkon Shield intrauterine device accompanied by the question, "DID YOU USE THIS IUD?" The advertisement then detailed various afflictions the device was alleged to have caused and stated Zauderer's firm was bringing suit for women with those complaints and invited others to join. The ad then stated: "The cases are handled on a contingent fee basis of the amount received. If there is no recovery, no legal fees are owed by our clients."

Zauderer was reprimanded for the advertisements by the Ohio Supreme Court. *See* 10 Ohio St. 3d 44, 461 N.E.2d 883 (1984). On appeal to the United States Supreme Court that Court held: "insofar as the reprimand was based on [Zauderer's] use of an illustration in his [second] advertisement . . . and his offer of legal advice in his advertisement . . . the judgment is reversed." 471 U.S. at __, 105 S. Ct. at __, 85 L. Ed. 2d at 675.

I. Defendants think the *Zauderer* decision presages an end to our authority to regulate electronic advertising by Iowa lawyers. They point to the Court's discussion in addressing Ohio's prohibition of (1) overreaching and (2) blanket prohibitions.[1]

A. *Overreaching.*

The Court first considered whether Zauderer's advertisements amounted to impermissible self-recommendation and whether he wrongfully accepted employment resulting from unsolicited legal advice. The Court found the Dalkon Shield advertisement was "neither false nor deceptive: in fact, it was entirely accurate." 471 U.S. at ____, 105 S. Ct. at ____, 85 L. Ed. 2d at 665. The Court also observed the advertisement made no suggestion that Zauderer had special expertise in Dalkon Shield litigation. As a result Ohio had the burden of showing that prohibiting the ads advanced a substantial governmental interest. The Court rejected the state's argument that its interest in preventing overreaching, invasion of privacy, and undue influence justified the discipline imposed on Zauderer. *See Ohralik* v. *Ohio State Bar Association,* 436 U.S. 447, 462, 98 S. Ct. 1912, ____, 56 L. Ed. 2d 444, 457 (1978) (because above interests were substantial, Court upheld ban on in-person solicitation).

The Court emphasized that the prohibition of face-to-face solicitation upheld in *Ohralik* did not extend to "truthful advertising about the availability and terms of routine legal services." 471 U.S. at ____, 105 S. Ct. at ____, 85 L. Ed. 2d at 666 (quoting *Ohralik,* 436 U.S. at 455, 98 S. Ct. at ____, 56 L. Ed. at 453). The Court noted:

---

[1]The Court also considered whether Ohio could require attorneys who advertise their availability on a contingent fee basis to include a statement indicating that a client would be liable for litigation costs even if the lawsuit were unsuccessful. Disclosure of the risk of paying litigation costs is a matter we discussed in our prior opinion. 355 N.W.2d at 570. The Court upheld Ohio's requirement, holding that a rule which required an attorney to include "purely factual and uncontroversial information about the terms under which his services will be available" passed constitutional muster. *Id.* at ____, 105 S. Ct. at ____, 85 L. Ed. 2d at 672.

> The concerns that moved the Court in *Ohralik* are not present here. Although some sensitive souls may have found appellant's advertisement in poor taste, it can hardly be said to have invaded the privacy of those who read it. More significantly, appellant's advertisement – and print advertisement generally – poses much less risk of overreaching or undue influence.

471 U.S. at ____, 105 S. Ct. at ____, 85 L. Ed. 2d at 666.

B. *Blanket prohibitions.*

The Court also struck down Ohio's blanket prohibition of the use of illustrations in lawyer advertising:

> [T]he use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly. Accordingly, commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech: restrictions on the use of visual media in advertising must survive strict scrutiny under the *Central Hudson* test.

Id. at ____, 105 S. Ct. at ____, 85 L. Ed. 2d at 670. The Court further noted that Zauderer's illustration depicting a Dalkon Shield was not false or misleading and therefore Ohio again bore the burden of showing a substantial governmental interest to justify the prohibition. The Court rejected Ohio's argument that a blanket restriction on illustrations was necessary to ensure the public would not be misled or confused by lawyer advertising. The Court pointed to the state's lack of a record showing that the rule was necessary to avoid these risks. The Court said:

> . . . because it is probably rare that decisions regarding consumption of legal services are based on a consumer's assumption about qualities of the product that can be represented visually, illustrations in lawyer's advertisements will probably be less likely to lend themselves to material representations than illustrations in other forms of advertising.

Id. at ____, 105 S. Ct. at ____, 85 L. Ed. 2d at 671. Thus, the Court was "not persuaded" that the state's blanket prohibition was constitutional and instead suggested that the use of illustrations in lawyer advertising would need to be policed on a case-by-case basis. *Id.*

We cannot believe these points, or anything said by the Court in *Zauderer,* portend what defendants insist.

II. Perhaps the strongest basis for concluding the *Zauderer* rationale has no impact on electronic media advertisements is that we have the Supreme Court's word for it. In our prior opinion in this case, 355 N.W.2d at 569, we mentioned our reliance on language in *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 384, 87 S. Ct. 2691, 2709, 53 L. Ed. 2d 810, 836 (1977), which acknowledged the "special problems" inherent in electronic broadcasts which warrant "special consideration." We took this exclusion seriously and at face value because we emphatically agree that "special problems" do exist in the field of electronic advertising. It was because of them that we, and those who helped us, went to considerable effort to consider and draft our electronic advertising rule. If we misapprehended the language just quoted, if there are in fact no special problems in this area which warrant a special rule, then we have squandered those efforts.

We however believe our understanding was borne out in the *Zauderer* opinion. The majority opinion in *Zauderer* strictly adheres to the exclusion of electronic advertising by carefully omitting it from its sweep. Concluding the discussion of whether Zauderer unlawfully solicited legal business is this summary of the holding:

> An attorney may not be disciplined for soliciting legal business through *printed* advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients.

Id. at ____, 105 S. Ct. at ____, 85 L. Ed. at 670 (emphasis added). Moreover, in discussing whether Zauderer's advertisement

constituted unlawful solicitation and self-recommendation, the majority noted that "appellant's advertisement – and *print* advertisement generally – poses much less risk of overreaching or undue influence." *Id.* at ____, 105 S. Ct. at ____, 85 L. Ed. 2d at 666. (Emphasis added).

The dissenting opinion concurred in the majority's judgment concerning the use of illustrations, noting that "[a]t least in the context of *print media* the task of monitoring illustrations in attorney advertisements is not so unmanageable as to justify Ohio's blanket ban." *Id.* at ____, 105 S. Ct. at ____, 85 L. Ed. 2d at 686-87. (Emphasis added).

In a footnote to the foregoing statement is this unchallenged observation:

> Like the majority, I express no view as to whether this is also the case for broadcast media. As the court observed in *Bates* v. *State Bar of Arizona,* . . . "the special problems of advertising on the electronic broadcast media will warrant special consideration."

We continue to believe the "special problems" recognized by the United States Supreme Court exist in the field of electronic advertising. These problems warrant a special rule to regulate lawyer advertising in the electronic media.

III. Defendants cite the *Zauderer* holding that "self recommendation" could not be prohibited so long as the advertisement was not false or misleading or unless the state could show a substantial governmental interest in disallowing it. They also point to *Zauderer*'s disapproval of Ohio's "blanket ban" on the use of illustrations in printed lawyer advertising, a disapproval which also hinged on the absence of a record showing the illustrations were false or misleading and on the absence of a substantial governmental interest. Defendants think these holdings both undermine our electronic advertising rule.

We have alternative, though closely related, responses. First we claim, as we did in our prior opinion, a substantial govern-

mental interest in regulating what we perceive as a very real potential for abuse. We identify such a potential in the field of the electronic media for the same reasons that impelled the United States Supreme Court to target it as an area with special problems. Those special problems were spelled out to our satisfaction in the exhaustive record made in the public hearings before our ethics committee. We mentioned those hearings and their place in the development of their rule in our prior opinion. 355 N.W.2d at 568. On the basis of this record we think the situation in electronic advertising lies closer to face-to-face solicitation (which, as we have said, can be proscribed) than to printed advertising (which cannot).

Electronic media advertising, when contrasted with printed advertising, tolerates much less deliberation by those at whom it is aimed. Both sight and sound are immediate and can be elusive because, for the listener or viewer at least, in a flash they are gone without a trace.[2] Lost is the opportunity accorded to the reader of printed advertisements to pause, to restudy, and to thoughtfully consider. The purpose of defendants' television advertisements was much more immediate. A former member of the firm, once a defendant in this proceeding, testified: ". . . when [the advertisement] . . . was flashed on the screen with the phone number, and the phone number repeated twice, that was designed, I believe, to promote those individuals to write it down or even better grab the phone and make a call."

Our prior opinion, 355 N.W.2d at 569, relied on an observation of the United States Supreme Court that the broadcast media are uniquely pervasive and intrusive. *Federal Communications Commission* v. *Pacifica Foundation,* 438 U.S. 726, 748, 98 S. Ct. 3026, 3039, 57 L. Ed. 2d 1073, 1093 (1978) ("the broadcast media have established a uniquely pervasive presence in the lives of all Americans"); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 127, 93 S.

[2]For the same reason electronic advertisements are more difficult to police. A printed advertisement is much easier to document, to trace, and to preserve than an electronic advertisement.

Ct. 2080, 2098, 36 L. Ed. 2d 772, 798 (1973) ("viewers constitute a 'captive audience' "). This pervasiveness bears on the contrast between print and electronic advertising. One expert witness explained: ". . . You are watching a television program. The ad is there. It intrudes upon your area of visibility, and forces itself upon you, but a print ad is not the same way."

Our belief that electronic advertising presents a very strong potential for abuse, justifying its regulation, was also borne out by plans for future advertising for these defendants. Norton Frickey, of Denver, Colorado, testified as president of the enterprise which prepared and sold the television advertisements at issue. He testified that lawyers need to use advertisements to improve their image and was asked, on cross-examination, about plans to use John Madden, formerly a professional football coach and now a sports announcer. Norton described Madden as "an image enhancer." His testimony continues:

> If you put your name on a T.V. commercial where John Madden is a spokesman, you've just got to believe me that it will enhance your image.
>
> Q. And people will come to [the lawyer placing the ad] because of that? A. Well, certainly, people will call.
>
> . . .
>
> Q. He is kind of known as a fighter isn't he? Those [beer] commercials that he [Madden] does where he busts up a bar and goes after them? A. Well, I would like to project that image as a lawyer, and if he does project that image, I'll expect it. I would be proud if that's the way he comes out to the public. I would accept that.

We think the purpose — and the obvious effect — of this advertising is far removed from what was targeted as protected in *Zauderer* and in *Bates*. It should scarcely be necessary to mention that the prohibitions against lawyer advertising, which we formerly maintained in common with the other states, were struck down because of a perceived need for the public to gain

information. That information concerned the availability and cost of legal services. Electronically conveyed image-building was not a part of the information package which has been described as needed by the public. The special potential for abuse presented by electronic lawyer advertising is especially apparent at the important line we have tried our best to draw between the dissemination of protected information and crass personal promotion. The field cries out for careful regulation.

IV. We of course deny that our rule amounts to a blanket ban, in the sense proscribed in *Zauderer*. Rather, the rule provides only for the regulation of a form of advertising which is recognized as ripe for abuse. We have no apologies to make for our rule. We believe it to be decidedly in the interest of the public in the state we serve. We ratify our prior order that a writ issue.

WRIT ISSUED.

All justices concur except Reynoldson, C.J., and Schultz and Wolle, JJ., who concur specially, and Uhlenhopp, Larson, and McCormick, JJ., who dissent.

REYNOLDSON, C.J. (concurring specially).

I join the majority opinion, and write further only to express my deep philosophical concern for the future of state courts if the *Zauderer*[1] holding is to be extended to the uncontrollable and inevitable machinations of television advertising, absent the safeguards provided by our rules challenged here.

I. Surely no one will dispute there is a compelling state interest that state courts be, *and should be perceived to be,* forums in which controversies will be seriously and dispassionately resolved, and justice administered, in a structured, disciplined, and dignified environment. It is more than an axiom that "[j]ustice must satisfy the appearance of justice."[2]

From the early history of the common law to this day, lawyers have been inextricably linked in the minds of persons generally, as well as in fact, to the functions of the courts and the adjudication process. Blackstone in the middle of the 18th century wrote that attorneys were "admitted to the execution of their office by the superior courts of Westminster hall, and are in all points officers of the respective courts of which they are admitted."[3] The observation from *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 792, 95 S. Ct. 2004, 2016, 44 L. Ed. 2d 572, 588 (1975), that "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts,' " has been underscored by repeated quotation in subsequent Supreme Court decisions.[4] Small wonder, then, that "[s]ince the founding of the Republic,

---

[1]Zauderer v. Office of Disciplinary Counsel, ____ U.S. ____, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985).

[2]Friendly, *On Judging the Judges,* in State Courts: A Blueprint for the Future 72 (T. Fetter ed. 1978) (quoting Justice Felix Frankfurter).

[3]2 *Sharswood's Blackstone's Commentaries* 25 (1864).

[4]*See, e.g.,* Hoover v. Ronwin, ____ U.S. ____, ____ n. 18, 104 S. Ct. 1989, 1996 n. 18, 80 L. Ed. 2d 590, 600 n. 18 (1984); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 484 n. 16, 103 S. Ct. 1303, 1316 n. 16, 75 L. Ed. 2d 206, 223-24 n. 16 (1983); In re Primus, 436 U.S. 412, 422, 98 S. Ct. 1893, 1899, 56 L. Ed. 2d 417, 428 (1978).

the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions,"[5] and that the legal profession is the only profession so intimately related to the judicial branch as to be separately regulated by it.[6]

The nexus that lay persons observe betwen lawyers and the courts was noted by the Iowa court in *Committee on Professional Ethics & Conduct* v. *Bromwell,* 221 N.W.2d 777 (Iowa 1974):

> Lay persons recognize that the bench and bar each have a grave and heavy responsibility in the administration of justice. The practicing lawyer assumes an important role both in and out of court. He or she is the first to pass on the merit, or lack of merit, of potential litigation as a client unfolds facts across a desk. . . .
>
> In the courtroom a lawyer is still more conspicuous as a vital force in our justice system. The importance of his function was well described more than 20 years ago by Dean Roscoe Pound:
>
> "The average controversy is likely to have two sides, each believed in, in good faith by honest men. In order to decide such controversies satisfactorily the case of each party must be presented thoroughly and skillfully, so that things are put in their proper setting and the tribunal may review the whole case intelligently and come to a conclusion with assurance that nothing has been overlooked,

---

[5]Leis v. Flynt, 439 U.S. 438, 442, 99 S. Ct. 698, 700, 58 L. Ed. 2d 717, 722 (1979).

[6]This inherent regulatory authority is claimed under the judicial power constitutionally allocated to the courts. *See, e.g.,* Conway-Bogue Realty Investment Co. v. Denver Bar Association, 135 Colo. 398, 409, 312 P.2d 998, 1002 (1957); People ex rel. Illinois State Bar Association v. People's Stock Yards State Bank, 344 Ill. 462, 470, 176 N.E. 901, 905 (1931); Committee on Professional Ethics & Conduct v. Bromwell, 221 N.W.2d 777, 780 (Iowa 1974); In re Integration of Nebraska State Bar Association, 133 Neb. 283, 287, 275 N.W. 265, 267 (1937); Danforth v. Egan, 236 S.D. 43, 47, 119 N.W. 1021, 1022-23 (1909).

> nothing misapprehended, and nothing wrongly valued.
>
> . . .
>
> . . . [P]roper presentation of a case by a skilled advocate saves the time of courts and so public time and expense. It helps the court by sifting out the relevant facts in advance, putting them in logical order, working out their possible legal consequences, and narrowing the questions which the court must decide to the really crucial points. . . .
>
> Experience has shown abundantly the waste involved in inexpert presentation of cases by laymen or by inexperienced or inept practitioners." — The Lawyer from Antiquity to Modern Times, pp. 25-26 (West Publishing Company, 1953).
>
> It is in these ways that lawyers are inextricably and logically connected, in the public view, with the application of law and the protection of constitutional rights.

Id. at 779.

The state courts cannot be disassociated, in the minds of lay persons, from the conduct of their officers, either in or out of court. These courts, struggling in the face of financial constraints to fulfill their most basic functions, have not been supplied with sufficient resources to expand their regulatory responsibility in order to police even the ingenious activity of the minority of lawyers who have utilized print advertising to promote dishonest scams. Such a lawyer defrauded many Iowa clients without the knowledge of the court before his license could be revoked.[7] One need not conduct a formal poll of the

[7] *See* Bishop v. Committee on Professional Ethics & Conduct, 521 F. Supp. 1219 (S.D. Iowa 1981) (attack by Bishop on Iowa's advertising rules that were drafted with the intent to conform with the holding in Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)), *vacated and remanded*, Bishop v. Committee on Professional Ethics & Conduct, 686 F.2d 1278 (1982) (on ground lawyer's license had been revoked, rendering case moot; attorney not adequate representative at time class was certified); In re Bishop, 320 N.W.2d 47 (Iowa 1982) (license revoked for converting funds).

nation's chief justices to determine that a number of states, faced with the massive task of regulating lawyer print advertising under the after-the-fact, case-by-case scrutiny applied in the commercial setting, are abandoning the field with mild rule admonitions to do nothing undignified or misleading, words subject to constitutional challenge.[8] The task would loom even larger if the sights, color, sounds, subliminal messages, and not-so-hidden persuaders of commercial television advertising were added to the burden.

Many of the more flagrant advertisements by court officers, generated by greed, do more than diminish state courts in the eyes of the public. The total legal advertising movement, coupled with the climate created by words taken out of context in implementing Supreme Court decisions (for example, the *Bates* statement that "the belief that lawyers are somehow 'above' trade has become an anachronism"),[9] has resulted in increased unsavory solicitation. The horde of lawyers that descended on the disaster at Bhopal, India, brought the American judicial system into worldwide disrepute.

II. The record before us demonstrates some of the problems inherent in policing television advertising without the safeguards of our rules, and the damage to the justice system occasioned by those officers who utilize the manipulative television techniques of the marketplace.

This lawyer, who advertised extensively and testified that 80% of his clients came to his office as a result of his advertisements, 521 F. Supp. at 1221, collected fees and costs in his legal clinics located in three Iowa cities, then left the state. Thus far 82 claims totaling $17,564.50 have been processed and paid by the Client Security and Attorney Disciplinary Commission, out of funds provided by Iowa lawyers and judges. *See* 1984 Client Sec. & Att'y Disciplinary Comm'n Ann. Rep. 3; 1983 Client Sec. & Att'y Disciplinary Comm'n Ann. Rep. 3; 1982 Client Sec. & Atty'y Disciplinary Comm'n Ann. Rep. 4.

[8] *But see* Spencer v. Honorable Justices of the Supreme Court, 579 F. Supp. 880, 892 (E.D. Pa. 1984), *aff'd*, 760 F.2d 261 (1st Cir. 1985); *Bishop*, 521 F. Supp. at 1232 ("dignified," as used in advertising, held not unconstitutionally vague).

[9] Bates v. State Bar of Arizona, 433 U.S. 350, 371-72, 97 S. Ct. 2691, 2703, 53 L. Ed. 2d 810, 828 (1977).

Norton Frickey, president of Network Affiliates, the lawyer and advertising salesman who produced defendants' television advertisements, volunteered that he failed miserably when he attempted to do his own soliciting via television. The secret, he discovered, was to use "authoritarian figures" like the fake doctor in the advertisement run by the defendants, or, continuing down the series, the fixture-breaking ex-coach John Madden, famous for his Miller beer advertisements. The intent of Frickey's advertisements is to have the advertised lawyers be seen by the public as "skillful and competent," "trustworthy and honest," and the product is specifically "designed . . . to have people call you." A casual scrutiny of the "doctor" television advertisement run by these defendants discloses the bottom-line message: A *thinking* injured person[10] would telephone the *defendants*.[11] Under this record, however, the defendants had no demonstrated expertise in personal injury litigation.

The disturbing future progress of lawyer television advertising surfaced throughout this litigation. Defendants' alleged advertising expert, Lori B. Andrews, defended with slight amusement a Wisconsin court officer's advertisement, which she described in the following language:

> In the particular ad at issue, he does his ads in a humorous way and they're all take-offs of existing ads by major advertisers. The particular ad you're talking about was a take-off on a jewelry ad, and in the ad he comes out of water in a scuba suit and tells people that [if] they're in over their head with bankruptcy problems, they can call the legal clinic . . . .

Further, in a recorded colloquy during the submission of this case, counsel for defendants expressed no reservations about

---

[10]The description of the television advertisement contained in the minority opinion omits the declaration of the fake doctor that "[t]he *choice* of a lawyer could be important. That's something to *think* about." (Emphasis added.) This, of course, is followed at once by the name of the defendant firm.

[11]*See Bates*, 433 U.S. at 383-84, 97 S. Ct. at 2709, 53 L. Ed. 2d at 835-36 ("[A]dvertising claims as to the quality of services . . . are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction.").

the "award winning" lawyer television advertising, itself the subject of a long-running advertisement in a national lawyer's magazine. A copy of this advertisement is attached as an addendum to this concurrence.[12] Here is the robed judge, on the bench flanked by flags with his gavel before him, listening with intense and respectful concentration to a one-on-one dissertation by the lawyer, who rests his elbow casually on the bench. The message conveyed to the viewer is obvious: Here is a lawyer who has the private ear of the judge in the courtroom. The message about the court is equally, and unfortunately, very clear.

Although such advertisements may propose a "commercial transaction," *Zauderer*, ____ U.S. at ____, 105 S. Ct. at 2275, 85 L. Ed. 2d at 663, most are transactions designed to be consummated in the trial courtrooms of the states, where ninety-six percent of the litigation in this country occurs. These solicitations are tailored further to establish firm linkage between the advertising lawyers and the courts. It is not surprising that the logos most repeatedly usurped by advertising lawyers are the scales of justice, which historically, in one form or another, have graced thousands of state courtrooms.

Solemn forums for the litigation of cases whose lawyer-officers resemble carnival barkers at the doors scarcely can avoid being viewed as carnivals, or at least, places where justice is bought and sold as in any marketplace. Judicial systems are not equipped, nor do they have the time, to police Madison Avenue.

III. Neither can merit be perceived in the implied suggestion that the necessary regulation be accomplished through the Federal Trade Commission, which appears here as amicus on behalf of defendants.[13] The FTC's ability to insure that advertising

[12]*See, e.g.*, Trial, Jan. 1984, at 7; Trial, Mar. 1984, at 9.

[13]There is no reason to believe that the Federal Trade Commission would take a position opposing that of another United States agency, the antitrust division of the United States Department of Justice. On September 21, 1984, the antitrust division sent a letter to the highest judicial courts of forty states, including Iowa, criticizing the American Bar Association's new model rules concerning fees, solicitation, and advertising because they would *curtail* "face-

"flows both freely and cleanly"[14] in the commercial arena may be tested with John Madden's beer advertisements which teach youths watching televised sports that drinking Miller's is macho and interests attractive women; or with the subtle messages to millions of adolescent girls that they can become both slim and daring by smoking Virginia Slims[15]; or with the televised demonstrations, watched by impressionable children, that baseball players and cowboys get real pleasure by placing another carcinogen, Skoal, between cheek and gum, utilizing the thumb and finger.

Iowa long has been in the forefront with protective measures for persons involved in its legal proceses, all with the support of its organized, voluntary bar association. The Iowa Supreme Court was the second in the nation to mandate continuing legal education for lawyers and judges.[16] It was the first in the United States to mandate compulsory audits of lawyer trust accounts.[17] This step was ancillary to court rules which created a client security fund, now totaling over $1,400,000,[18] to reimburse embezzled clients.[19] As of July 1, 1985, through supreme court order,[20] Iowa became one of a handful of states[21] mandating that interest on lawyer trust accounts be combined through a

---

to-face conversations . . . that focus on the prospective client's particular legal problem." Letter from J. Paul McGrath, Assistant Attorney General, Antitrust Division, to W.W. Reynoldson, Chief Justice of the Iowa Supreme Court, at 5 (Sept. 21, 1984); *see ABA President Answers Justice Depart. Attack,* Bar Leader, Jan.-Feb. 1985, at 11-12.

[14] *Bates,* 433 U.S. at 384, 97 S. Ct. at 2709, 53 L. Ed. 2d at 836.

[15] Over 350,000 Americans each year, or almost 1000 every day, die of cigarette smoking. Most became addicted to nicotine as adolescents. Between 1968 and 1979, smoking among all teenaged girls increased from 8.4% to 12.7%. Among 17- to 18-year-old girls, 26.2% smoke. American Heart Association, American Lung Association, American Cancer Society, *Smoking or Health,* 4, 9-12 (Mar. 1985).

[16] Order filed April 9, 1975.

[17] Order filed December 5, 1973.

[18] 1984 Client Sec. & Att'y Disciplinary Comm'n Ann. Rep. 1.

[19] Order filed December 5, 1973.

[20] Order filed December 28, 1984, establishing the trust account as of July 1, 1985, pursuant to an application filed by The Iowa State Bar Association.

[21] As of June 1, 1985, only four states had mandatory systems. 3 IOLTA Update 11 (Summer 1985).

commission and used primarily to provide legal services to the poor in civil cases. Further, lay persons appointed by the court serve on its Committee on Professional Ethics and Conduct, Grievance Commission, Client Security and Attorney Disciplinary Commission, Commission on Continuing Legal Education, Board of Law Examiners, Lawyer Trust Account Commission, and Specialization Committee.

The Iowa Supreme Court continued this movement after *Bates,* following the procedures outlined in its first opinion, *Committee on Professional Ethics & Conduct* v. *Humphrey,* 355 N.W.2d 565, 568 (Iowa 1984), to bring its rules into conformance. We were then only concerned, of course, with amending those rules so that they did not "prevent the publication in a newspaper of [lawyers'] truthful advertisement concerning the availability and terms of routine legal services." *Bates,* 433 U.S. at 384, 97 S. Ct. at 2709, 53 L. Ed. 2d at 836. Following the federal district court decision in *Bishop,* 521 F. Supp. 1219, we again amended our rules in the few respects they there were found constitutionally deficient. After *Zauderer* was filed, we have amended our rules to permit advertising other than words and numbers, and to assure that our itemization of objective information would be viewed merely as a "safe harbor" approach.[22] We thought we had provided the means by which all objective information concerning a lawyer's education, experience, skills, fees, and availability could be conveyed to a potential client making a reasoned selection among advertising lawyers. The resulting rules do not constitute the bright line we might have drawn to protect the stature of the courts against the excesses of unprofessional court officers, but at least it was not obliterated.

Zauderer, which narrows any remaining gap between state court officers and tradespeople with respect to the puffing that may be permissibly printed, further endangers the capability of the courts to identify and dislodge lawyer print advertising that is false, deceptive, or misleading. The line is blurred further if

[22]Order filed November 8, 1985.

Zauderer is to be applied without restriction to the television media and solicitation for services in state courts is to be delegated to "authoritarian" pitchmen utilizing all the slick imagery, promotion, and aggressive overreaching of Madison Avenue in the invasion of lay persons' living rooms.

The effectiveness of state courts, which have only moral suasion and public respect for the ultimate vindication of their judicial power,[23] is enhanced by the perception that courts are served by a cadre of professional court officers.[24] These professionals in turn should be perceived in the light described by Justice Frankfurter:

> From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character."

Schware v. *Board of Bar Examiners,* 353 U.S. 232, 247, 77 S. Ct. 752, 761 1 L. Ed. 2d 796, 806 (1957) (concurring opinion). The television advertising exposed in the record before us hardly projects the above-described qualities. I am unwilling to believe the Supreme Court would extend *Zauderer* to the undefinable parameters of commercial television. Nor should we. Our rules are designed to permit television advertising while avoiding the excesses and dangers otherwise so inherent and accepted in that media. These rules reasonably protect defendants' first amendment rights. At the same time, they protect the integrity of

---

[23] *See,* 1 A. de Tocqueville, *Democracy in America* 145 (P. Bradley ed. 1945):

> It is a strange thing, the authority that is accorded to the intervention of a court of justice by the general opinion of mankind! It clings even to the mere formalities of justice, and gives a bodily influence to the mere shadow of the law. The moral force which courts of justice possess renders the use of physical force very rare
>
> . . . .

[24] *See* Address by Simon H. Rifkind to the National Conference of Bar Presidents, Detroit (Feb. 15, 1985) adapted and printed in *Professionalism Under Siege,* Bar Leader, Sept.-Oct. 1985, at 13-14.

Iowa's courts in "the primary governmental function of administering justice."[25]

Schultz and Wolle, JJ., join this special concurrence.

UHLENHOPP, J. (dissenting).

I had thought our rules constituted a reasonable compromise between unrestricted lawyer advertising and the maintenance of the dignity of the profession of law, so as to satisfy the First Amendment as construed in *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 87 S. Ct. 2691, 53 L. Ed. 2d 810 (1977). But the United States Supreme Court has now rer anded the present case to us for reconsideration in light of *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. ____, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985). While *Zauderer* did not involve the electronic media, the Supreme Court must have believed it has relevancy to the present case.

In reconsidering this case, our duty is to try to anticipate the Supreme Court's opinion on it or on a case like it, in light of *Zauderer.* Upon closely reading *Zauderer,* I have the impression that the Court takes quite a broad view of constitutionally protected lawyer advertising. I therefore reluctantly conclude that the rules which defendants challenge cannot stand. Hence I would dissolve the temporary injunction and would restrain enforcement of those rules.

LARSON, J. (dissenting).

A doctor turns from an x-ray viewer and faces his television audience. His nurse is at his side. The doctor says he has "see[n] firsthand, injuries caused by the neglect of others," and, if the viewer has suffered such an injury, he "should be talking to a lawyer."

The scene immediately switches to an office, presumably that of a lawyer. A background voice says:

---

[25] *Bates,* 433 U.S. at 361-62, 97 S. Ct. at 2698, 53 L. Ed. 2d at 822.

> If you're injured through the negligence of others, call the law firm of Humphrey, Haas and Gritzner. Cases involving auto accidents, work comp [sic], serious personal injuries and wrongful death handled on a percentage basis. No charge for the initial consultation. Call now at 288-0102.

In a separate episode, a print-shop employee turns off a noisy machine in the background to tell the television viewer that "I suffered loss of wages, incurred staggering medical bills, and endured pain and suffering, all through the negligence of others." He says, however, that he had made a mistake by failing to see a lawyer. The camera then switches to the law office scene and the same information is given about the Humphrey and Haas firm.

These are two of the three television commercials involved in this case. In the third, a bowling alley scene, two team members note they are one man short, because "he was injured through the negligence of others." They agree that the teammate should talk to a lawyer and that the choice of a lawyer "will be important." The scene then shifts to the office scene and the Humphrey and Haas "pitch."

While these commercials could be characterized as dull by today's standards, or "class B in quality," according to one witness, there is still too much pizazz in them for the Iowa rules. The doctor in the x-ray scene is not a doctor at all. He is an actor. So is his nurse. Perhaps the x-ray being examined is not even a real x-ray. The commercial is a dramatization, and that violates our rules. The "printer" commercial compounds the dramatization violation by adding the noise of the printing press, a "background sound," which is also prohibited. The bowling commercial violates the rules for several reasons: It is a dramatization, there is background sound (bowling noises), and there are two voices instead of one, which is the limit under the rules. Moreover, the commercials make "laudatory statements" about Humphrey and Haas, according to the Committee.

The majority, in its original opinion, concluded that such techniques "would manipulate the viewer's mind and will" and

we must protect the viewer by prohibiting such tactics altogether. *See Committee on Professional Ethics and Conduct* v. *Humphrey*, 355 N.W.2d 565, 571 (Iowa 1984). I believe every Supreme Court case from *Bates* through *Zauderer* refutes that conclusion.

While the scenes are brief, about thirty seconds each, they convey important information to viewers. First, the commercials say that, if a person is injured by another, the law might provide a remedy. (Testimony in this case, based on studies for the American Bar Association's Commission on Advertising, showed that a significant percentage of people are unaware of this seemingly self-evident fact.)[1] The commercials also provide information on contacting a law firm and on the costs for certain cases, areas also shown to be unfamiliar to many people.

The potential for these "slice of life" commercials to inform the public about other general matters, such as consumers' rights; the need for a will; or the need for legal representation in various contract relationships, such as house purchases, is almost unlimited. General information about statutes of limitations and other problems arising out of a claimant's inaction might prevent the loss of an otherwise valid claim.

Despite the need for this kind of information, it may not be included in a television commercial in Iowa, because DR2-101(B) does not permit it. That rule allows twenty categories of information, largely relating to the lawyer's background and qualifications, but prohibits dissemination of general information about the rights and needs of the viewer. Amazingly, the majority approves the suppression of such information on the theory it is necessary to prevent the viewer from being "misled." To television viewers lacking information about the system,

[1]Evidence in the hearing in this case included the results of an American Bar Association-American Bar Foundation joint study, which revealed: Over one-third of the persons interviewed had never used a lawyer. Of these, eight-three percent said they did not know how to contact one. Thirty percent of those persons injured through the negligence of others did not pursue a remedy. Among the reasons given for this were (1) they could not identify the legal problems because of the lack of information; (2) they felt attorneys were inaccessible; and (3) they felt intimidated by lawyers.

basic knowledge of their legal rights remains classified information.

To summarize the disciplinary rules involved, rule 2-101(A) prohibits all "appeals to the emotions," even though all of the experts testifying in this case agreed that *all* advertising is an appeal to some kind of emotion. Rule 2-101(A) also prohibits advertising which appeals to the "likes or dislikes of a person," whatever that means. Additionally, this rule provides that no information may be conveyed by any form of advertising except that contained in the "laundry list" of rule 2-101(B). Rule 2-101(B) allows television dissemination of the laundry-list items but restricts the techniques by limiting advertising to "words and numbers only, articulated by a single nondramatic voice, not that of the lawyer, and with no other background sound." The cumulative effect of these rules is to constrict the flow of information in a manner unparalleled by any other jurisdiction.[2]

I. *The Central Hudson Test.*

Any first amendment challenge to restrictions on commercial speech must involve an application of the four-part test of *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557, 566, 100 S. Ct. 2343, 2351, 65 L. Ed. 2d 341, 351 (1980). *See Zauderer* v. *Office of Disciplinary Council,* 471 U.S. ____, ____, 105 S. Ct. 2265, 2275, 85 L. Ed. 2d 652, 663-64 (1985); *In re R.M.J.,* 455 U.S. 191, 203, 102 S. Ct. 929, 937, 71 L. Ed. 2d 64, 74 (1982).

The majority in the original opinion in the present case acknowledged that the *Central Hudson* test should be applied

[2]Testimony at the hearing established that at least forty-four states permit legal advertisements which use dramatization and graphics; at least forty-three permit background music, actors, and personal appearances, while only one state other than Iowa limits the number of voices involved. It further established that at least twenty-six states require that advertisements be dignified and twenty-one states allow legal advertising limited only by the requirement that they not be false, fraudulent, misleading, or deceptive. The latter is the approach in the American Bar Association's present Model Rules of Professional Conduct 7.1 and 7.2.

even though, I contend, it did not actually apply it. *See Humphrey,* 355 N.W.2d at 568. In the present opinion, the majority does not even acknowledge the *Central Hudson* test.

Under this test, the initial question is whether the advertisements in question are misleading or concern an illegal activity, in which case the state may prohibit them altogether. *Central Hudson,* 447 U.S. at 566, 100 S. Ct. at 2351, 65 L. Ed. 2d at 351. If the advertisements are not subject to outright prohibition, the state may restrict them only if all of the following tests are met: (1) the governmental interest in the restrictions is substantial; (2) the restrictions directly advance that governmental interest; and (3) the restrictions are no more extensive than necessary to serve that interest. *Id.*

In applying the *Central Hudson* test to this case, the threshold issue is whether the commercials are actuallay misleading or deceptive. All of the witnesses testifying at the hearing, including those called by the committee, agreed that the advertisements are not deceptive or misleading. The majority concedes that point. Moreover, the witnesses agreed that there is nothing inherently deceptive or misleading in dramatizations, illustrations, background sound, or music. In fact, in evidence introduced by the commission, one expert testified that "if you do not use motion in a television commercial, you get no audience. People don't pay attention to it."

Despite the consistent recognition by the Supreme Court that *Central Hudson* is the controlling test, the majority announces its own rule, one which I believe is a perversion of the *Central Hudson* test:

> Without suggesting that the advertisements here were deceitful, we do agree with the committee that, *in the medium defendants chose [television], the public could well be misled by them.* We think the situation is exactly what the United States supreme court had in mind when it referred to the "special problems" in electronic media advertising. We think the challenged rule falls clearly within the area left to us by the *Bates* opinion.

Humphrey, 355 N.W. 2d at 570 (emphasis added). The holding of the majority in the original opinion, and here, is that, because *Bates, R.M.J.*, and *Zauderer* all involved print media, they are distinguishable. Because of this fact, it holds, our court is free to fashion a new test based on the *possibility* of deceptiion.

This is the language of *Bates* which the majority relies on:

> As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising. Advertising concerning transactions that are themselves illegal obviously may be suppressed. *And the special problems of advertising on the electronic broadcast media will warrant special consideration.* Cf. Capitol Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.C. 1971), aff'd sub nom Capitol Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000, 31 L. Ed. 2d 472, 92 S. Ct. 1289 (1972).

Bates, 433 U.S. 350, 384, 97 S. Ct. 2691, 2709, 53 L. Ed. 2d 810, 836 (1977) (emphasis added) (citations omitted).

What does the emphasized language mean? It is possible the Supreme Court had in mind potential problems in enforcement arising out of the transitory nature of electronic advertising. This, of course, could be minimized by requiring copies of a telecast or broadcast to be kept for a specified period of time. This is the rule of several states, and the rule of the American Bar's Commission on advertising, Model Rule 7.2. It is perhaps more likely that the Supreme Court was simply not willing to address a matter not specifically before it.

At any rate, I do not believe this language from *Bates* was intended to be used as a license to single out the medium of television for application of substantially different rules, or to accord it any less protection under the first amendment. In my prior dissent, I discussed this *Bates* language and the effect of *Capitol Broadcasting* cited therein. I merely incorporate that discussion here. *See Humphrey*, 355 N.W.2d at 573 (Larson, J., dissenting).

A prophylactic rule, aimed at preventing possible abuses in some cases by imposing a ban for all cases, has been rejected by the Supreme Court. *See Zauderer*, 471 U.S. at ____, 105 S. Ct. at 2278, 85 L. Ed. 2d at 668. The present case presents a classic example of such a rule: These commercials are admittedly not misleading or deceptive, yet they are to be banned because, under other circumstances in other cases, similar techniques and content might mislead someone.

The majority rationalizes this result on the ground that the state has a substantial interest at stake in "fostering rational, intelligent, and voluntary decision-making in determining the need for legal services and selecting a lawyer." *Humphrey*, 355 N.W.2d at 571 ("We think the rule [restricting techniques and content] advances the state interest by aiding the citizen in making an intelligent selection of counsel."). In other words, the majority reasons, the public cannot make an informed decision unless the state sifts out the information to be disseminated to it. This approach, characterized by the Supreme Court as "paternalistic," has also been expressly rejected by it. *See Bates*, 433 U.S. at 365, 97 S. Ct. at 2699, 53 L. Ed. 2d at 824.

In *Bates*, as here, it was argued that allowing too much information could be harmful to the consumer. *Bates* noted that similar arguments had been made in an earlier case, *Virginia Pharmacy Board* v. *Virginia Consumer Counsel*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). It said:

> [W]e observed [*in Virginia Pharmacy*] that "on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance." But we noted the presence of a potent alternativbe to this "highly paternalistic" approach: "That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." The choice between the dangers of suppressing information and the dangers arising

> from its free flow was seen as precisely the choice "that the First Amendment makes for us."

Bates, 433 U.S. at 365, 97 S. Ct. at 2699-2700, 53 L. Ed. 2d at 824 (citations omitted).

Even if it were established that the state has a substantial interest in preventing abuses by enactment of such regulatory measures, there is a further requirement: The state must show that the regulations are no more extensive than necessary to serve that interest. *Central Hudson,* 447 U.S. at 566, 100 S. Ct. at 2351, 65 L. Ed. 2d at 351. How then does the majority deal with this element? By simply declaring it inapplicable; these rules do not restrict dissemination of information, the majority says, they only restrict some tools:

> We reject defendants' contention that the prohibition against background sound, visual displays, multiple dramatic statements, and self-laudatory statements is more extensive than necessary to serve the state interests. *All that is prohibited are the tools which would manipulate the viewer's mind and will.*

Humphrey, 355 N.W.2d at 571 (emphasis added.)

The least-restrictive-alternative argument, I believe, cannot be disposed of so summarily. The Iowa rules do not merely regulate "tools" of communication; they have a virtual stranglehold on lawyer advertising. By stringent control of techniques and content, they directly affect the dissemination of information to the public. The present case, in fact, is a good example of their effect. In this case, there is no evidence by the committee that a less restrictive method would not be effective.

The goal of regulation is to prevent fraud and deception in advertising. *See Bates,* 433 U.S. at 383, 97 S. Ct. at 2709, 53 L. Ed. 2d at 835. To accomplish that goal, there are other, less restrictive, alternatives to an outright ban on techniques and content. The most obvious, of course, is to simply prohibit false and misleading advertising. This is the rule in at least twenty-six states and the rule adopted by the American Bar Association's Commission on Evaluation of Professional Standards. *See,*

Model Rules of Professional Conduct Rule 7.1 and 7.2 (1983). Any abuses could be dealt with on a case-by-case basis. This is the less restrictive alternative suggested by the Supreme Court in *Zauderer*. *See* 471 U.S. at ____, 105 S. Ct. at 2281, 85 L. Ed. 2d at 671 ("Given the possibility of policing the use of illustrations in advertising on a case-by-case basis, the prophylactic approach taken by Ohio cannot stand . . . .").

The record in this case, moreover, showed that less restrictive alternatives are effective to prevent abuses. Most other states have rules which *are* less restrictive, rules which permit the techniques and content barred by ours. Yet, according to the testimony of the former staff director of the American Bar Association's Commission on Advertising, no problems have arisen under those less stringent rules. I think it is clear, based on that fact alone, that the suppressive regulations of our own rules are not necessary in order to prevent abuse.

I wish the majority of our court had the same degree of confidence in the bar expressed by the Supreme Court in *Bates*, when it said:

> We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust.

Bates, 433 U.S. at 379, 97 S. Ct. at 2707, 53 L. Ed. 2d at 833.

II. *The Effect of Zauderer.*

The Supreme Court vacated the original majority opinion in this case and remanded it for consideration in light of *Zauderer*. As already observed, the majority responds by simply saying *Zauderer* has no application, because it involved print media. I believe *Zauderer* is applicable to this case for several reasons:

First, it reaffirms the Supreme Court's view that prophylactic rules cannot be imposed to restrict lawyer advertising when less restrictive means are available. Second, *Zauderer* downplayed any distinctions between lawyers' advertising and others.' It said:

> In short, assessment of the validity of legal advice and information contained in attorneys' advertising is not necessarily a matter of great complexity; nor is assessing the accuracy or capacity to deceive of other forms of advertising the simple process the State makes it out to be. The qualitative distinction the State has attempted to draw eludes us. . . .
>
> . . . Prophylactic restraints that would be unacceptable as applied to commercial advertising generally are therefore equally unacceptable as applied to appellant's advertising.

Zauderer, 471 U.S. at ____, 105 S. Ct. at 2279-80, 85 L. Ed. 2d at 669-70.

Last, *Zauderer* is relevant to television advertising, because it emphasizes the underlying rationale for allowing lawyer advertising in the first place. That is the need of the public for more information concerning their rights under the law.

The Supreme Court in *Bates* observed:

> As the bar acknowledges, "the middle 70% of our population is not being reached or served adequately by the legal profession." Among the reasons for this underutilization is fear of the cost, and an inability to locate a suitable lawyer. . . . Advertising can help to solve this acknowledged problem: Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange.

Bates, 433 U.S. at 376, 97 S. Ct. at 2705, 53 L. Ed. 2d at 831 (citation omitted). This concern was reaffirmed in *Zauderer*:

> Our recent decisions involving commercial speech have been grounded in the faith that the free flow of

> commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.

Zauderer, 471 U.S. at ____, 105 S. Ct. at 2279-80, 85 L. Ed. 2d at 669.

While it is true, as Justice O'Connor points out in her dissent, that *Zauderer* did not actually involve electronic media, I believe the first amendment principles it recognizes nevertheless apply here. Its holding that (1) case-by-case disciplinary proceedings, as a less restrictive alternative, must be used in preference to a blanket ban; (2) its recognition that rules governing commercial advertising generally should apply to lawyer advertising; and (3) its reaffirmance of the need for a fully informed public, are as relevant to television advertising as they are to any other medium.

I think it is especially important to foster the use of television, because of its great potential for informing the public. The American Bar Association's Task Force on Lawyer Advertising, in studying the area of lawyer advertising, noted that applying more restrictive rules to television would adversely affect marginally literate persons and those who do not read print media for other reasons. The Commission observed:

> A 1975 report by the Department of Health, Education and Welfare indicates that approximately one-fifth of the adults in this nation are functionally incompetent in basic skills, including reading skills. A 1976 Roper Survey indicates that a large majority of the American public obtain information about current affairs from radio and televisioin, rather than newspapers.

ABA Code of Professional Responsibility Amendments, *Task Force on Lawyer Advertising, Report to the Board of Governors,* 46 U.S.L.W. 1, 2 (August 23, 1977).

The American Bar Association Commission on Evaluation of Professional Standards rejected the notion that different rules

should be adopted for television. The Commission in its comment noted:

> Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal servies to many sectors of the public. *Limiting the information that may be advertised [by television] has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.*

Model Rules of Professional Conduct Rule 7.2 (1983) (Commission comment) (emphasis added).

The need for increased public understanding of the legal system, and the potential of television to fill that need, is borne out in a report made to this court in 1981 by the Iowa Judicial Coordinatig Committee. The report began with this observation:

> "The judiciary is the least understood of the three branches of government, yet it does the least to assist the public and the news media in truly understanding the function of the judicial process." Since the turn of the century, the responsibility, power, and authority of the courts has expanded at a rapid pace, with the courts becoming perhaps the most powerful and persuasive governmental force in this country. Issues presented to and decided by the courts touch on all parts of the citizens' lives. *Despite the importance of these issues and the effect of court decisions on citizens, the public has a very limited understanding and comprehension of the legal system.*

Public Opinion Survey: The Iowa Court System, 1 (Judicial Coordinating Committee, Iowa Supreme Court, 1981) (footnotes omitted).

Central to this report was a survey of Iowans concerning the extent and sources of their knowledge of the legal system. There is an interesting statistic included in that survey. In response to

the question, "From what source have you learned the most about Iowa courts?", nineteen percent said school or formal instruction. *Id.* at 23. Almost as many, eighteen percent, said it was from television. Thirty-nine percent said it was from newspapers. *Id.* The Iowa report also cited a national survey which showed that in fact more people gained information from television than from newspapers. *Id.* at 25.

I believe dissemination of useful information and the attendant elimination of some of the mystique surrounding the legal process would not only provide valuable information to the viewer, it would in fact enhance the image of the legal profession. More significantly, rules which would permit this would comply with the first amendment.

I would dissolve the temporary injunction and restrain the enforcement of these rules.[3]

McCormick, J., joins this dissent.

[3] *Zauderer* held that advertising rules could require an attorney advertising a contingent fee to state, in the advertisement, that the client might be liable for certain costs, even if the client lost the case. Humphrey and Haas concede this holding would cause problems with their commercials, which did not contain such a statement. On this issue, *Zauderer* is distinguishable because, in that case, the advertisement said there would be "no charge" if the client lost, while the Humphrey and Haas commercials involved here made no such statement. In any event, these defendants chose not to argue that issue.

APPENDIX C

IN THE SUPREME COURT OF IOWA

69088

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Plaintiff,

vs.

MARK A. HUMPHREY, FREDD J. HAAS, and JAMES E. GRITZNER, d/b/a HUMPHREY, HAAS AND GRITZNER,
Defendants.

MARK A. HUMPHREY and FREDD J. HAAS, individually and doing business as HUMPHREY AND HAAS,
Counterclaimants,

vs.

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Defendant to Counterclaim.

[Filed Nov. 20, 1985]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Defendants/Counterclaimants, Mark A. Humphrey and Fredd J. Haas, individually and doing business as Humphrey and Haas, hereby appeal to the Supreme Court of the United States from the final judgment of the

Supreme Court of Iowa entered in this action on November 13, 1985, upholding the constitutionality of DR 2-101 and DR 2-105 of the Iowa Code of Professional Responsibility for Lawyers, and permanently enjoining Defendants/Counterclaimants from using television advertisements that violate that rule.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Mark W. Bennett
MARK W. BENNETT
Babich, Bennett & Nickerson
5835 Grand Avenue, Suite 202
Des Moines, Iowa 50312
515-274-3581

DAVID H. REMES
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5212

Attorneys for Defendants/
Counterclaimants, Mark
A. Humphrey and Fredd J.
Haas, individually and doing
business as Humphrey and Haas

Original and two copies
filed; copies mailed to:

Nick Critelli
Attorney at Law
500 United Central Bank Building
Des Moines, Iowa 50309

Frank A. Comito, Jr.
Attorney at Law
4701 University Avenue
Des Moines, Iowa 50311

Attorneys for Plaintiff/
Defendant to Counterclaim

APPENDIX D

Iowa Code of Professional Responsibility for Lawyers

DR 2-101 Publicity.

(A) A lawyer shall not, on the lawyer's own behalf or that of a partner, associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, use, or participate in the use of, any form of public communication which contains any false, fraudulent, misleading, deceptive, self-laudatory, or unfair statements, which contain any statements or claim relating to the quality of the lawyer's legal services, which appeals to the emotions, prejudices, likes, or dislikes of a person, or which contains any claim that is not verifiable. In all communications under DR 2-101 and DR 2-102 the lawyer may use restrained subjective characterizations of rates or fees such as "reasonable," "moderate," and "very reasonable," but shall avoid all unrestrained subjective characterizations of rates or fees, such as, but not limited to, "cut-rate," "lowest," "give-away," "below-cost," and "special." All such communications shall contain the following disclosure: "The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Iowa."

(B) Subject to the limitations contained in these rules, lawyer advertising may be communicated to the public in newspapers, periodicals, trade journals, "shoppers," and other similar advertising media, published and disseminated in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides, or in the classified advertising section of the telephone directory distributed in the geo-

graphic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides, or in reputable legal directories generally available in such area. The same information may be communicated by direct mail, in which case the direct mail communication and the envelope containing the same shall, in addition to other disclosures that may be required hereunder, carry the following disclosure in red ink in type approximately two times the size used in the communication sent: "ADVERTISEMENT ONLY." A copy of all direct mail communications shall be filed with the administrator, or the administrator's designee, of the committee on professional ethics and conduct of the Iowa State Bar Association, acting as commissioners of the supreme court as provided by court rule 118, contemporaneously with the mailing of the communications to the general public. The same information, articulated only by a single non-dramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio or television. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications on radio and television, to the extent possible, shall be made only in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides. The following information shall be presumed to be informational and not soley promotional:

(1) Name, including name of law firm, names of professional associates, addresses, telephone numbers, and the designation "lawyer", "attorney", "law firm", or the like;

(2) Fields of practice, limitation of practice or specialization, but only to the extent permitted by DR 2-105;

(3) Date and place of birth;

(4) Date and place of admission to the bar of state and federal courts;

(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Legal authorships;

(9) Legal teaching position;

(10) Memberships, offices and committee assignments in bar associations;

(11) Membership and offices in legal fraternities and legal societies;

(12) Technical and professional licenses;

(13) Memberships in scientific, technical and professional associations and societies;

(14) Foreign language ability;

(15) Names and addresses of bank references;

(16) With their written consent, names of clients regularly represented;

(17) Subject to DR 2-103, prepaid or group legal services programs in which the lawyer participates;

(18) Whether credit cards or other credit arrangements are accepted;

(19) Office and telephone answering service hours; and

(20) Race, sex, religion, or ethnic background.

Nothing contained herein shall prohibit a lawyer from permitting the inclusion in reputable law lists and law directories intended primarily for the use of the legal profession of such information as traditionally has been included in these publications.

All such information shall be presented in a dignified manner.

(C) The following fee information may be communicated to the public in the manner permitted by DR 2-101(B):

(1) Fee for an initial consultation;

(2) Availability upon request of either a written schedule of fees or an estimate of the fee to be charged for specific services, or both;

(3) Contingent fee rates subject to DR 2-106 (C), provided that the statement discloses whether percentages are computed before or after deduction of costs, and advises the public that in the event of an adverse verdict or decision, the contingent fee litigant could be liable for court costs, expenses of investigation, expenses of medical examinations, and costs of obtaining and presenting evidence; and

(4) Fixed fees or range of fees for specific legal services or hourly fee rates provided that, in print size at least equivalent to the largest print used in setting forth the fee information, the statement discloses:

(a) that the stated fixed fees or range of fees will be available only to clients whose matters are encompassed within the described services; and

(b) if the client's matters are not encompassed within the described services, or if an hourly fee rate is stated, the client is entitled, without obligation, to a specific written estimate of the fees likely to be charged.

All such information shall be presented in a dignified manner.

(D) For purposes of this rule, the term "specific legal services" shall be limited to the following services:

(1) Abstract examinations and title opinions not including services in clearing title;

(2) Uncontested dissolutions of marriage involving no disagreement concerning custody of children, ali-

mony, child support or property settlement [see DR 5-105(A)];

(3) Wills leaving all property outright to one beneficiary and contingently to one beneficiary or one class of beneficiaries;

(4) Income tax returns for wage earners;

(5) Uncontested personal bankruptcies;

(6) Changes of name;

(7) Simple residential deeds;

(8) Residential purchase and sale agreements;

(9) Residential leases;

(10) Residential mortgages and notes;

(11) Powers of attorney;

(12) Bills of sale.

The committee on professional ethics and conduct of the Iowa State Bar Association, acting as commissioners of the supreme court as provided by court rule 118, on its own motion or upon the request of a lawyer admitted to practice in this state, shall, from time to time, consider and recommend to the court proposed amendments to the Code, expanding or constricting the above list of "specific legal services." In considering such amendments the committee shall apply the following criteria which have guided the supreme court in determining which services should be included in the above list:

(1) The description of the service would not be misunderstood by the average layperson or be misleading or deceptive;

(2) Substantially all of the service normally can be performed in the lawyer's office with the aid of standardized forms and office procedures;

(3) The services does not normally involve a substantial amount of legal research, drafting of unique

documents, investigation, court appearances or negotiation with other parties or their attorneys; and

(4) Competent performance of the service normally does not depend upon ascertainment and consideration of more than a few varying factual circumstances.

The committee shall adopt regulations, subject to the approval of the supreme court, to provide a procedure to receive and consider such requests from lawyers, and for the prompt submission to this court of any appeal from a determination adverse to such request. Said committee may further issue, subject to the approval of the supreme court, regulations further defining or describing "specific legal services" within the meaning of this rule.

(E) Unless otherwise specified in the public communication concerning fees, the lawyer shall be bound, in the case of fee advertising in the classified section of the telephone directory, for a period of at least the time between printings of the directory in which the fee advertisement appears and in the case of all other fee advertising for a period of at least ninety days thereafter, to render the stated legal service for the fee stated in the communication unless the client's matters do not fall into the described services. In that event, or if a range of fees is stated, he shall render the service for the estimated fee given the client in advance of rendering the service.

(F) A lawyer shall not, on behalf of himself, his partners, associates or any other lawyer affiliated with him or his firm, use the public communication of fee information concerning specific legal services as an indirect means of attracting clients for whom he performs other legal services not related to the specific legal services publicized; nor may the term "clinic" or any similar term be used in any communication to the public unless the practice of

the lawyer or his firm is limited to routine matters for which costs of rendering the service can be substantially reduced because of the repetitive nature of the services performed and the use of standardized forms and office procedures. Whether or not it contains fee information, a lawyer shall preserve in his office a copy of each advertisement placed in a newspaper, the classified section of the telephone directory, or periodical and a tape of the radio or television commercial or recording for at least three years and a record of the date or dates and name of the publication in which it appeared or the name of the station upon which it was aired.

(G) A lawyer recommended by, paid by or whose legal services are furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits.

(H) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue;

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients;

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer;

(4) In and on legal documents prepared by him;

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof; and

(6) In communications by a qualified legal assistance organization, along with the biographical information permitted under DR 2-101(B), directed to a member or beneficiary of such organization.

(I) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity in a news item nor voluntarily give any information to such representatives which, if published in a news item, would be in violation of DR 2-101(A).

(J) In the event that the communication seeks to advise the institution of litigation, said communication also must disclose that the filing of a claim or suit solely to coerce a settlement or to harass another could be illegal and could render the person so filing liable for malicious prosecution or abuse of process.

[Court Order February 28, 1977; February 17, 1978; July 24, 24, 1979; May 6, 1980; Oct. 10, 1984; Nov. 8, 1985]

* * * *

DR 2-105. Description and Limitation of Practice

(A) A lawyer may hold himself or herself out publicly as practicing in or limiting his or her practice to certain fields of law as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents", "Patent Attorney", "Patent Lawyer", or "Registered Patent Attorney" or any combination of those terms, on his professional card, letterhead, office sign, professional notice or announcement, and telephone directory listings, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals and legal directories, as other-

wise allowed by DR 2-101(B). In addition to use of the designation "Patents", "Patent Attorney", "Patent Lawyer", and "Registered Patent Attorney", a lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Trademarks", "Trademarks and Copyright Matters", "Trademark Attorney", "Trademark Lawyer", or any combination of those terms on his professional card, letterhead, office sign, professional notice or announcement and telephone directory listing, all as othrwise allowed by DR 2-102(A), and in newspapers, periodicals and legal directories as otherwise allowed by DR 2-101(B), provided the lawyer satisfies the eligibility requirements of DR 2-105(A)(4) in any one of the fields of practice of "Patents, Trademarks or Copyright Matters" or combination thereof.

(2) An individual lawyer who, in fact limits practice to certain fields of law or who is limiting this practice primarily to certain fields of law, and who satisfies the eligibility requirements of DR 2-105(A)(4), may indicate such limitation or description of practice by listing, in the manner provided by DR 2-105 (A)(3), not more than three of the following fields of law practice in any communication otherwise allowed by DR 2-102(A) and DR 2-101(B):

Administrative Agency Matters
Admiralty
Antitrust and Trade Regulation
Appellate Practice
Banking and Creditor Law
Constitutional Law
Consumer Claims and Protection
Corporate Finance and Securities Law
Corporation and Business Law
Criminal Law
Debt and Bankruptcy Matters

Domestic Relations and Family Law
Environmental Law
Health Law
Immigration and Customs
Insurance
International and Foreign Law
Job Discrimination and Civil Rights
Labor Law
Legislative Matters
Military Law
Municipal and Local Government Law and Finance
Pension, Profit Sharing and Employee Benefit Plans
Personal Injury and Property Damage Claims
Public Utility Matters
Real Estate Law
Taxation Law
Trademarks and Copyright Matters
Transportation Law
Trial Practice
Wills, Estate Planning and Probate Matters
Workers Compensation

The committee on professional ethics and conduct of the Iowa State Bar Association, acting as Commissioners of the supreme court as provided by court rule 118, on its own motion or upon the request of a lawyer admitted to practice in this state, shall, from time to time, consider and recommend to the court proposed amendments to the Code expanding or restricting the permitted list of fields of law practice.

(3) Description or indication of limitation of practices permitted by DR 2-105(A)(2) shall be only in the following manner:

(a) If the lawyer accepts only legal matters in that lawyer's listed fields of law practice, such listing of fields of law practice shall be preceded by the words "Practice limited to . . ."; or

(b) If the lawyer is practicing primarily in that lawyer's listed fields of law practice but he also accepts other types of legal matters, such listing of fields of law practice shall be preceded by the words "Practicing primarily in . . .";

and shall, in the case of a description or indication of limitation of practice communicated to the public in the classified section of telephone directories, newspapers, periodicals, or legal directories, contain within such communication, or prominently have displayed on the same page of such communication, the disclosure required under DR 2-101(A) and also a "Notice to the Public" in the following form:

> "A description or indication of limitation of practice does not mean that any agency or board has certified such lawyer as a specialist or expert in an indicated field of law practice, nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer. All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa."

In the case of a description or indication of limitation of practice communicatted to the public in the classified section of telephone directories, a lawyer shall not permit that lawyer's name to be listed under a heading or classification other than "Attorneys" or "Lawyers".

(4) Prior to communication of a description or indication of limitation of practice permitted by DR 2-105(A)(2), a lawyer shall report his compliance with the following eligiblity requirements each year

in the written report required to be submitted to the Commission on Continuing Legal Education:

(a) The lawyer must have devoted the greater of 200 hours or twenty percent of his time spent in actual law practice to each separate indicated field of practice for each of the last two calendar years; and

(b) The lawyer must have completed at least ten hours of accredited Continuing Legal Education courses of study in each separate indicated field of practice during the preceding calendar year.

The first report of compliance may be made in 1979. In reporting compliance with subsection (a), a statement of compliance is sufficient. In reporting compliance with subsection (b), the lawyer shall identify the specific courses and hours which apply to each indicated field of practice. Contents of the portion of the report required by this rule shall be public information.

(B) A lawyer may communicate the name of state and federal courts in which he or she is currently permitted to practice on his professional card, letterhead, office sign, professional notice or announcement, and telephone directory listings, all as otherwise allowed by DR 2-102(A), and in newspapers, periodicals and legal directories, as otherwise allowed by DR 2-101(B).

If, due to hardship or extenuating circumstances, a lawyer is unable to complete the hours of accredited continuing legal education during the preceding calendar year as required by DR 2-105(A)(4)(b), the lawyer may apply to the Commission on Continuing Legal Education for an extension of time in which to complete the hours. No extension of time shall be granted unless written application therefor shall be made on forms

prescribed by the Commission. Extensions of time within which to fulfill the minimum eduational requirements may, in individual cases involving hardship or extenuating circumstances, be granted by the Commission for a period not to exceed six months immediately following expiration of the year in which the requirements were not met.

[Amended Feb. 17, 1978; Oct. 11, 1978; Mar. 5, 1979; May 29, 1979; Oct. 10, 1984; Nov. 8, 1985]

APPENDIX E

IN THE SUPREME COURT OF IOWA

No. 69088

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Plaintiff

vs.

MARK A. HUMPHREY, FREDD J. HAAS and JAMES E. GRITZNER, dba HUMPHREY, HAAS AND GRINTZNER,
Defendants

[Filed Sept. 14, 1982]

PETITION FOR INJUNCTION

Comes now the Plaintiff, the Committee on Professional Ethics and Conduct of The Iowa State Bar Association, and pursuant to Iowa Rules of Civil Procedure, and for its Petition for Injunction states:

1. That the Plaintiff, the Committee on Professional Ethics and Conduct of The Iowa State Bar Association, is a regularly appointed standing Committee of The Iowa State Bar Association the members of which are Commissioners of the Supreme Court, whose Chairman is James E. Cooney of Des Moines, Iowa.

2. That the Defendants, Mark A. Humphrey, Fredd J. Haas and James E. Gritzner, individuals who are licensed to practice law in various courts of the State of Iowa,

who practice under the firm name of Humphrey, Haas and Gritzner, and all times material hereto, reside and have offices for the practice of law in Des Moines, Polk County, Iowa.

3. That the Iowa Supreme Court has by Court Order promulgated certain rules governing the practice of law, said rules are known as The Iowa Code of Professional Responsibility for Lawyers.

4. That contained in the Iowa Code of Professional Responsibility for Lawyers are DR2-101 which governs Publicity and DR2-105 which governs Description and Limitation of Practice.

5. That pursuant to DR2-101(D) the Plaintiff did as part of their rules establish and obtain confirmation by Supreme Court Order of procedures for lawyers to obtain advance approval of publicity which is at variance with the provisions of DR2-101 and DR2-105 or to apply to have said rules changed. Said procedures are set out in Rules 5.1 through 5.6 of the Rules of Procedure Professional Ethics and Conduct Committee of The Iowa State Bar Association.

6. That the Defendants have contracted with Palmer Communications, Inc. (WHO-TV) to televise three different commercials advertising their services.

7. That the television commercials violate the provisions of DR2-101 in that said commercials contain more than a single non-dramatic voice, have background sound and visual displays of two or more people characterizing themselves as clients which make laudatory comment as to Defendants' services.

8. That the television commercials violate the provisions of DR-105 in that they list four areas of practice and contain no disclaimer.

9. That the said commercials have been shown on television station WHO-TV eleven (11) times in the past and

is [sic] scheduled to be shown for a total period of forty-seven (47) weeks.

10. That the Defendants at no time sought or received any advance approval for either a change in DR2-101 or DR2-105, nor did they seek or receive approval for the specific commercials shown by Palmer Communications, Inc. (WHO-TV).

11. That Chapter 6[illegible] of the Iowa Code and Supreme Court Rule 118 provides procedures for disciplining lawyers who violate the Iowa Code of Professional Responsibility for Lawyers, but these procedures by necessity take long periods of time, and do not provide for any procedures to stop the continued violation of said rules.

12. That the Plaintiff herein is charged with the duty and responsibility to investigate and bring appropriate action against lawyers who violate any provisions of the Iowa Code of Professional Responsibility for Lawyers.

13. That the Plaintiff has received, through communications to its staff, information that Defendants intend to continue to show the commercials either on WHO-TV or some other television station in the Des Moines viewing area.

14. That unless restrained the Defendants will continue in their violation of DR2-101 and DR2-105, said conduct causing irreparable damage and thereby causing any judgment ineffectual.

15. That there is no other adequate remedy at law in which to restrain said violation.

16. That this Petition has not been presented to or refused in whole or in part by any other Judge or Justice.

WHEREFORE, Plaintiff prays that the Court issue a temporary injunction without notice enjoining the Defendants from advertising by use of the television com-

mercial advertisements currently in the possession of Palmer Communiactions, Inc. or by any advertisement in conflict with the Iowa Code of Professional Responsibility for Lawyers and for an order commanding the Defendants to withdraw forthwith the television commercials heretofore shown by Palmer Communications, Inc. (WHO-TV).

Plaintiff further prays that the Court issue a permanent injunction and that the Court set the matter of permanent injunction for hearing and prescribe notice and that on hearing the Court permanently enjoin the Defendants from further violation of the Iowa Code of Professional Responsibility for Lawyers via television commercials.

Plaintiff further prays that the Court set bond as provided by the Iowa Rules of Civil Procedure.

Plaintiff further prays for such other and further relief as the Court may deem just and equitable in consideration of the premises.

/s/ Frank A. Comito, Jr.
FRANK A. COMITO, JR.
Comito and Capps
4701 University Avenue
Des Moines, Iowa 50311
(515) 274-4105

APPENDIX F

IN THE SUPREME COURT OF IOWA

No. 69088

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Plaintiff,

vs.

MARK A. HUMPHREY, FREDD J. HAAS, and JAMES E. GRITZNER, d/b/a HUMPHREY, HAAS AND GRITZNER,
Defendants.

MARK A. HUMPHREY and FREDD J. HAAS, individually and doing business as HUMPHREY AND HAAS,
Counterclaimants,

vs.

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Defendant to Counterclaim.

[Filed Sept. 30, 1982]

ANSWER AND COUNTERCLAIM

ANSWER

COME NOW Defendants, Mark A. Humphrey and Fredd J. Haas, individually and doing business as Humphrey and Haas (hereinafter referred to as the "Defendants"), and for their Answer to Plaintiff's Petition for Injunction, respectfully state to the Court as follows:

1. The Defendants admit the allegations contained in paragraphs 1, 3, 4, 5, 9, 10, 12, 13, 15 and 16 of Plaintiff's Petition for Injunction.

2. The Defendants admit the allegations contained in paragraph 2 of Plaintiff's Petition for Injunction, but affirmatively state that as of September 13, 1982, James E. Gritzner was no longer associated with their law firm, and the name of the firm is now "Humphrey and Haas".

3. The Defendants deny the allegations contained in paragraph 6 of Plaintiff's Petition for Injunction.

4. In response to paragraph 7 of Plaintiff's Petition for Injunction, the Defendants admit that the television commercials contain more than a single voice and have background sounds and visual displays, but deny that the advertisements depict two or more people characterizing themselves as clients of Defendants, and further deny that the advertisements make laudatory comments as to the Defendants' services.

5. The Defendants deny the allegations contained in paragraph 8 of Plaintiff's Petition for Injunction.

6. In response to paragraph 11 of Plaintiff's Petition for Injunction, the Defendants admit that Chapter 610, *Code of Iowa* (1981), and Supreme Court Rule 118, provide procedures for disciplining lawyers who violate the Iowa Code of Professional Responsibility, but deny that these procedures "by necessity take long periods of time", and "do not provide for any procedures to stop the continued violation of said rules".

7. In response to paragraph 14 of Plaintiff's Petition for Injunction, the Defendants state that they would have continued to run television advertisements "unless restrained", but specifically deny that the continuation of their television advertising has, would or could cause any irreparable damage.

First Affirmative Defense

DR 2-101 of the Iowa Code of Professional Responsibility for Lawyers, entitled "Publicity", is facially unconstitutional, and is unconstitutional as applied to Defendants' television advertising, in violation of Defendants' rights of freedom of speech under the First Amendment to the United States Constitution.

Second Affirmative Defense

The phrase "nondramatic voice" contained in DR 2-101(B) of the Iowa Code of Professional Responsibility for Lawyers, is void for vagueness, in violation of the First and Fourteenth Amendment to the United States Constitution.

Third Affirmative Defense

The phrase "self-laudatory" contained in DR 2-101(A) of the Iowa Code of Professional Responsibility for Lawyers, is void for vagueness, in violation of the First and Fourteenth Amendments of the United States Constitution.

Fourth Affirmative Defense

DR 2-105 of the Iowa Code of Professional Responsibility for Lawyers, entitled "Description and Limitations of Practice", is facially unconstitutional, and is unconstitutional as applied to Defendants' television advertising, in violation of Defendants' rights of freedom of speech under the First Amendment to the United States Constitution.

WHEREFORE, Defendants pray that Plaintiff's Petition for Injunction be dismissed at Plaintiff's costs.

COUNTERCLAIM

COME NOW Mark A. Humphrey and Fredd J. Haas, individually and doing business as Humphrey and Haas, and for their Counterclaim herein, respectfully state to the Court as follows:

I. *INTRODUCTION.*

1. Counterclaimants seek declaratory and injunctive relief that the Iowa Code of Professional Responsibility for Lawyers, as it relates to television advertising, is unconstitutional and violates the First and Fourteenth Amendments to the United States Constitution.

II. *PARTIES.*

2. Counterclaimants are lawyers licensed to practice law in various courts in the State of Iowa, and practice under the firm name of "Humphrey and Haas". At all times material to this action, Counterclaimants have resided and have had offices for the practice of law in Des Moines, Iowa.

3. Defendant to Counterclaim is a regularly appointed standing committee of the Iowa State Bar Association, the members of which are commissioners of the Iowa Supreme Court, and as such, are charged with the duty and responsibility of initiating and investigating violations of the Iowa Code of Professional Responsibility for Lawyers.

III. *JURISDICTION.*

4. Jurisdiction of this counterclaim is predicated upon 42 U.S.C. § 1983, and Rules 29 and 30 of the Iowa Rules of Civil Procedure.

IV. *FACTUAL BACKGROUND.*

5. Commencing on September 6, 1982, Counterclaimants engaged in television advertisements on behalf of their law firm.

6. On September 14, 1982, Defendant to Counterclaim initiated a Petition for Injunction in this Court and obtained a temporary injunction against the Counterclaimants, enjoining them from using television commercials alleged to be in violation of the Iowa Code of Professional Responsibility for Lawyers.

7. Counterclaimants desire to continue to engage in television advertising on behalf of their law firm, which would be in violation of the Iowa Code of Professional Responsibility for Lawyers, specifically DR 2-101 and DR 2-105, as they relate to television advertising.

8. The actions of Defendant to Counterclaim in enforcing the Iowa Code of Professional Responsibility for Lawyers, as it relates to television advertising by lawyers, and in filing the Petition for Injunction in this matter, arise under color of state law.

9. Counterclaimants are suffering irreparable injury as a result of the denial of their right to run their television advertisements and the imposition of Disciplinary Rules which unconstitutionally restrict their rights to freedom of speech under the First Amendment to the United States Constitution.

10. The enforcement of the unconstitutional restrictions contained in the Iowa Code of Professional Responsibility for Lawyers, and the filing of the Petition for Injunction by Defendant to Counterclaim, are the proximate cause of the violations of Counterclaimants' First Amendment rights.

V. *ALLEGATIONS OF UNCONSTITUTIONALITY.*

11. DR 2-101 of the Iowa Code of Professional Responsibility for Lawyers entitled "Publicity", and DR 2-105 of the Iowa Code of Professional Responsibility for Lawyers, entitled "Description and Limitation of Practice", are unconstitutional, in violation of the freedom of speech clause of the First Amendment to the United

States Constitution, and the due process clause of the Fourteenth Amendment to the United States Constitution.

VI. *RELIEF.*

12. Counterclaimants respectfully pray that this Court issue a declaratory judgment pursuant to Iowa Rule of Civil Procedure 261, declaring that DR 2-101 and DR 2-105 of the Iowa Code of Professional Responsibility for Lawyers, as they relate to television advertising, unconstitutionally restrict Counterclaimants' First Amendment freedoms and violate the due process clause of the Fourteenth Amendment of the United States Constitution.

13. Counterclaimants respectfully pray for a permanent injunction, pursuant to Iowa Rule of Civil Procedure 320, enjoining the Defendant to Counterclaim from enforcing, either facially or as applied, those portions of DR 2-101 and DR 2-105 of the Iowa Code of Professional Responsibility for Lawyers, as they relate to television advertising, which violate Counterclaimants' First and Fourteenth Amendment rights.

14. Counterclaimants respectfully pray for reasonable attorneys' fees pursuant to the Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. § 1988.

WHEREFORE, Counterclaimants respectfully pray for the relief set forth above.

/s/ Mark W. Bennett
MARK W. BENNETT
Babich, Bennett & Nickerson
5835 Grand Avenue, Suite 202
Des Moines, Iowa 50312
515-274-3581
Attorney for Defendants and Counterclaimants, Mark A. Humphrey and Fredd J. Haas, Individually and Doing Business as Humphrey and Haas

Original and two copies filed; copy mailed to:

Frank A. Comito, Jr.
Attorney at Law
4701 University Avenue
Des Moines, Iowa 50311
Attorney for Plaintiff

APPENDIX G

IN THE SUPREME COURT OF IOWA

No. 69088

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Plaintiff,

vs.

MARK A. HUMPHREY, FREDD J. HAAS and JAMES E. GRITZNER, dba HUMPHREY, HAAS AND GRITZNER,
Defendants.

[Filed Sept. 14, 1982]

ORDER FOR TEMPORARY INJUNCTION AND NOTICE OF HEARING ON PERMANENT INJUNCTION

NOW on this 14th day of Sept., 1982, this matter comes to the attention of this Court upon the verified Petition of the Plaintiff seeking both a temporary and permanent injunction against the Defendants enjoining them from using television commercials alleged to be in violation of the Iowa Code of Professional Responsibility for Lawyers. That based upon the information contained in the verified Petition the Court finds that it has jurisdiction of the parties and the subject matter. Further that a temporary injunction should issue without notice and that the matter of the permanent injunction of the parties should be set down for hearing and notice be given to the Defendants.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Defendants are temporarily enjoined from using the television commercials currently in the possession of Palmer Communications, Inc. for the purpose of advertising their services, and shall forthwith withdraw the same from further use.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the matter of the permanent injunction prayed for by the Plaintiff in its Petition be set down for hearing on the 23 day of Sept., 1982, at 3:00 o'clock p.m. before the Iowa Supreme Court, State Capitol Building, Des Moines, Iowa, and that notice of said hearing shall be had by serving a copy of the Petition and the Order upon the Defendants by personal service at least 7 days prior to the time set for hearing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any Defendant may file an application to have the matter as to the sufficiency of evidence relative to the temporary injunction be set down for hearing prior to the time set for hearing on the permanent injunction.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said temporary injunction shall issue upon Plaintiff's filing bond with surety approved by the Clerk in the penal sum of $500.00.

/s/ Mark McCormick
Justice of the
Iowa Supreme Court

APPENDIX H

IN THE SUPREME COURT OF IOWA

No. 69088

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Plaintiff,

vs.

MARK A. HUMPHREY, FREDD J. HAAS, and JAMES E. GRITZNER, d/b/a HUMPHREY, HAAS AND GRITZNER,
Defendants.

[Filed Sept. 28, 1982]

ORDER

On September 14, 1982 defendants were temporarily enjoined from using the television commercials in the possession of Palmer Communications, Inc. for the purpose of advertising their services, and ordered to withdraw the same from further use. The permanent injunction issue was scheduled for hearing September 22, 1982. Defendants Mark A. Humphrey and Fredd J. Haas have consented to continuance of the temporary injunction until an evidentiary hearing and final ruling by this court.

The court finds the hearing should be continued so that an evidentiary hearing may be held. The Honorable C. Edwin Moore is hereby appointed a Commissioner of this court to conduct a hearing in the above matter at a time and place to be selected by him.

The proceedings shall be reported and a transcript thereof filed with the clerk of this court by a certified shorthand reporter selected by the Commissioner and paid by the State of Iowa.

The Commissioner shall prepare a written summary of the evidence, but shall make no findings of fact or reach any conclusions of law. The summary shall be filed with the clerk of this court. Both parties may obtain discovery, if necessary, by those methods and under such conditions as shall be determined by the Commissioner upon motion.

Done this 28th day of September, 1982.

THE SUPREME COURT OF IOWA

By /s/ W. W. Reynoldson
W. W. REYNOLDSON
Chief Justice

Copies to:

Frank A. Comito, Jr.
Comito and Capps
4701 University Avenue
Des Moines, Iowa 50311

Humphrey & Haas
808 5th Avenue
Des Moines, Iowa 50309

Mark W. Bennett
Babich, Bennett & Nickerson
5835 Grand Avenue, Suite 202
Des Moines, Iowa 50312

James E. Gritzner
1549 N.W. 91st Street
Des Moines, Iowa 50322

Members of the Supreme Court

Honorable C. Edwin Moore
Polk County Courthouse
Des Moines, Iowa 50309

APPENDIX I

IN THE SUPREME COURT OF IOWA

No. 69088

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Plaintiff,

vs.

MARK A. HUMPHREY, FREDD J. HAAS, and JAMES E. GRITZNER, d/b/a HUMPHREY, HAAS AND GRITZNER,
Defendants.

MARK A. HUMPHREY and FREDD J. HAAS, individually and doing business as HUMPHREY AND HAAS,
Counterclaimants,

vs.

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,
Defendant to Counterclaim.

[Filed Nov. 16, 1983]

REPORT OF HEARING COMMISSIONER

Mr. Chief Justice and Members of the Iowa Supreme Court:

The undersigned appointed Hearing Commissioner submits the attached summary of the evidence taken in the above entitled cause.

It has been prepared with the assistance of the research department of the court, within the restrictions set out in the order of my appointment.

The 840 page transcript, the many exhibits listed therein and the summary have this day been filed with the clerk.

The clerk of this court shall promptly transmit copies of this order to the parties, or their attorneys of record, and all members of the court.

Respectfully submitted this 16th day of November, 1983.

/s/ C. Edwin Moore
C. EDWIN MOORE
Hearing Commissioner

SUMMARY OF EVIDENCE

1. Various admissions by defendants Humphrey and Haas were read into the record. (Tr. 14-20). Defendants contracted for the televising of at least three commercials on a Des Moines station advertising legal services. Each of the commercials contained the following: more than a single non-dramatic voice, background sound, visual displays other than words and numbers, visual displays beyond that which is allowed in print under DR 2-101, a list of four fields of law practice, no disclaimer of the type required by DR 2-105(A)(3), statements relating to contingent fees without disclosure as to whether such fees would be computed before or after deduction of costs. Unless restrained defendants would continue televising such commercials. Prior to televising their commercials defendants did not seek advance approval from the bar association or the supreme court and did not request amendment of the Code of Professional Responsibility or changes in the relevant disciplinary rules.

2. Talmage Eugene Thompson, general sales manager for WHO-TV testified for plaintiff concerning the circumstances under which defendants' commercials were placed and run. (Tr. 22-36). He testified concerning his general duties as sales manager and stated that WHO's geographical viewing area was probably the forty counties surrounding Des Moines. In August 1982, a national sales representative firm contacted the station regarding commercials for defendants' law firm to run scattered throughout the day Monday through Thursday forty-seven weeks out of the year with rotation during the 9-5 time period to give the benefit of as many program possibilities as possible. Thompson testified concerning the demographic breakdown of the audience during that time period, stating that the viewing audience was approximately 35,000-40,000 homes. Between 9:00 A.M. and noon the largest group of viewers consisted of

adults 25 and over. That time period had a target audience of older females while a younger and different audience tuned in during the afternoon. Defendants' commercials were screened prior to airing and were run eleven times, in no particular order of rotation, during a four day period before airing was discontinued at the request of the bar association.

3. James Gritzner, an attorney formerly a partner in defendants' firm, testified for plaintiff concerning the firm's decision to purchase and air the television commercials. (Tr. 36-80). He testified generally concerning his background in both law and broadcasting and stated that after joining the firm in October, 1981 he handled mostly personal injury and workers' compensation cases with some business litigation. After receiving a solicitation by mail from a Denver firm that syndicates legal advertising the partners discussed the possibility of contracting for the Des Moines area rights to the television commercials produced by the Denver firm. He testified that he was unenthusiastic about advertising on television but went to Denver, viewed 24 to 30 sample commercials, and was unimpressed by their quality and disapproved of the samples' use of a "hook" or tag line stating "He's in your corner." The purpose of the "hook" or tag line was stated to be to generate trust on the part of the target audience of blue collar workers and to increase viewer awareness of such matters as the fact that there was no charge for an initial consultation and that cases would be taken on a contingent fee basis. It was hoped that the commercials would generate immediate phone calls to the number shown. Gritzner testified that he was uncomfortable with both lawyer advertising generally and the Denver firm's experience that use of TV commercials had caused an enormous increase in case load at the expense of more complex types of cases. The partners were aware that the TV commercials did not conform to the Iowa rules but thought that the rules were unenforceable as a result of a then-recent United

States Supreme Court decision and, as a result, decided to air the commercials in order to be first in the Des Moines market without attempting to seek a declaratory judgment that such commercials would be permissible. The time for airing was intended to reach hospitalized or sick persons looking for entertainment. The total cost of the package was estimated to be approximately $45,000 per year and included a right to refuse any commercial produced by the Denver firm that was deemed unsuitable. Gritzner received the first phone call generated by the commercials, which was of a crank nature. His discomfort and embarassment with the concept of televised lawyer advertising led him to disassociate himself from the firm shortly thereafter but he stated that in his opinion defendants were not motivated by greed and a desire to become a settlement mill but, rather, sought to promote growth of the firm, and that they were willing and able to take cases to trial.

4. Robert Allbee, attorney and former supreme court justice, testified for plaintiff concerning the supreme court's adoption of rules regulating televised lawyer advertising. (Tr. 80-102). He testified concerning his profesisonal background and appointment to the court and stated that the current Iowa advertising rules were designed to prevent purely emotional reactions and inadvertent or intended deception and that the court order adopting the rules resulted from general satisfaction with the report of the bar committee that studied the matter. Reasons for not permitting dramatization were clearly enunciated in the report (P. Exh. 14) and, in addition, there was a larger purpose of protecting the public from misunderstanding or misapprehension. The objective was to limit the available information to content that was objective and informative rather than dramatic, persuasive, or promotional.

5. Dr. Richard Haynes, officer of Frank N. Magid Associates, a Cedar Rapids media research and consulta-

tion firm, testified for plaintiff concerning preparation and results of a survey conducted for plaintiff in which reaction to defendants' commercials was tested. (Tr. 105-296). He testified generally concerning his professional background in the field of mass communications and techniques of assessing the impact of commercials on viewers. P. Exh. 6 is the firm's conclusion and findings with regard to the survey conducted for plaintiff while P. Exh. 5 is the actual data obtained in the survey. Cedar Rapids area residents selected by a random digit dialing telephone procedure were guided through a questionnaire before and after viewing defendants' commercials in a manner that the witness stated was in accordance with generally accepted standards of research science; a focus group discussion was used in conjunction with the questionnaire. Prior to viewing of the commercial responses indicated a somewhat negative image of the legal profession that was not notably enhanced after viewing of the commercials. The pre-viewing average qualitative opinion of the profession was accompanied by high expectations. Seventy-one percent of the survey respondents expected a lawyer to be trustworthy prior to viewing defendants' commercials (P. Exh. 2 and 7) while after viewing the commercials 14% thought that defendants sounded like people who would be trustworthy. The commercials were found to be informational about such matters as the name of the firm, its phone number, and the fact that initial consultation was without charge but an imagery problem was noted. On cross-examination relating to the validity and reliability of the survey it was noted that the commercials were not perceived as misleading or deceptive nor, in Haynes opinion, were dramatized television commercials inherently deceptive or evil. About one-third of those contacted actually participated in the survey and the number of unemployed or unskilled participants did not reflect the percentage of such persons in the Cedar Rapids area. Viewing of the commercials was done in a studio rather than at home

and there was no control group exposed to commercials in compliance with the Iowa advertising rules. On redirect examination, it was stated that the potential for misleading or misinterpreting TV commercials was greater with dramatization due to the emotional nature of the response.

6. Lori Andrews, research attorney for the American Bar Foundation and former staff director of the American Bar Association Commission on Advertising, testified for defendants concerning various studies relating to legal advertising and interpretation of the study results and relevant United States Supreme Court decisions. (Tr. 298-391, 408). She testified generally concerning her professional background and particular work in the field of legal advertising. Her testimony was in an individual capacity and not as a representative of any organization. As a result of a survey taken while she was staff director the ABA Commission on Advertising concluded that the public has a need for information about lawyers and the cost and availability of legal services and that advertising provided a means for meeting that need. Various surveys showed that that need was not adequately being met by either the organized bar's efforts to provide information to the public or lawyer referral services. Roughly two-thirds of survey respondents approved of lawyer advertising but survey results showed that lawyers have an image problem. She opined, based on survey results, that limits on legal advertising darkened rather than helped lawyers' image and that the public favored advertising including dramatization. She also opined that emotional appeals do not create a need for legal services that did not already exist. At least 44 states permit legal ads using dramatization, graphics, etc., and at least 43 permit background music, actors, and personal appearances while only one state other than Iowa limits the voice involved. At least 26 states require ads to be dignified while 21 allow legal advertising gen-

erally so long as it is not false, fraudulent, misleading, or deceptive, and no particular problems have been encountered enforcing such a rule. She testified that the number of lawyers engaging in advertising was growing steadily and that with regard to regulation of such advertising there was a trend toward simply prohibiting false, fraudulent, and misleading ads and away from use of a list approach such as Iowa's, which she opined to be unconstitutional. She further opined that Iowa's treatment of televised legal advertising would not be effective in helping the public become aware of either the availability of legal services or information about legal rights.

7. Jay Trucks, a practicing attorney from Michigan, testified for defendants concerning his use of TV commercials including those aired by defendants. (Tr. 392-407). Ater testifying generally concerning his professional credentials he stated that his use of commercials produced by the Denver firm with which defendants contracted caused a dramatic increase in his personal injury practice due primarily to an influx of new clients from low income groups who had previously been unaware and/or ill-educated concerning their legal rights and the availability of legal services. He had received no complaints concerning his TV commercials and had received little or no response from an ad he ran in the yellow pages.

8. John A. DeMay, a practicing attorney from Pennsylvania, testified for defendants concerning his use of commercials produced by the Denver firm. (Tr. 414-438). He testified generally concerning an influx of new personal injury clients from low income groups, many of whom had been unaware of their legal rights prior to viewing his television commercials. Each commercial aired generated five to seven calls and approximately one call out of ten resulted in a new client.

9. Norton Frickey, Denver attorney and head of the firm producing and syndicating the television commercials aired by defendants, testified for defendants concerning the operation of his business and the effect of his commercials. (Tr. 439-469). He testified generally concerning his professional background and development of the advertising service co-existing with his law practice. He estimated that he had 91 to 95 current clients of his legal advertising service and four years experience with television commercials. He testified that his commercials were effective and directed toward blue collar persons, and enhanced the credibility of the profession. His commercials attempt to break down the image of lawyers as stuffy persons through such means as using John Madden for a spokesperson.

10. Daniel B. Wackman, professor in the University of Minnesota school of journalism and mass communication, testified for defendants concerning perceived deficiencies in the survey conducted by plaintiff's witness Hayne. (Tr. 470-566.) He testified generally concerning his professional credentials and the publications he had authored. His opinion that the survey lacked validity was based particularly on the lack of a suitable control group and lack of a real world setting from which it would be appropriate to generalize results and the attempt to compare perception of defendants after view of their commercials with the perception of an ideal lawyer prior to viewing the commericals.

11. Mark A. Schulman, president of a public opinion and market research firm and former vice-president of the Louis Harris polling firm, testified for defendants concerning perceived deficiencies in the survey conducted by plaintiff's witness Hayne (Tr. 566-596). He testified generally concerning his professional background in political science and quantitative research, and stated that he presently conducts surveys for clients of various test markets. His opinion that the Hayne survey lacked va-

lidity was based on the allegedly unrepresentative nature of the sample group as well as the grounds previously stated by defendants' witness Wackman.

12. On recall defendants' witness Wackman testified that due to such factors as inattentiveness TV viewers are less susceptible than is ordinarily assumed to emotional appeals in commercials and that adults from lower socioeconomic groups, like children whom he had studied, had learned to be skeptical of emotional sales pitches. He stated that the decision-making process is different with regard to the purchase of products like toilet paper as compared to such products as legal services. (Tr. 598-652).

13. Gene W. Murdock, assistant professor of business administration at the University of Wyoming, testified for defendants concerning perceived deficiencies in the survey conducted by plaintiff's witness Hayne. (Tr. 653-757). He testified generally concerning his professional background, especially in marketing, including some experience in the marketing of legal services. His opinion that the Hayne survey was not valid was based on perceived inadequacy and bias of the questionnaire's response scales, allegedly poor research design, and lack of a control group. His opinion that the survey lacked scientific reliability was based on the allegedly unrepresentative nature of the sample group. He found inadequate basis in the survey for the conclusion that the respondents' opinion of lawyers diminished after viewing defendants' commercials. He opined that obvious dramatization may have less tendency to mislead viewers than more formal and official-looking ads of a type that would comply with the present Iowa rules. He testified that surveys indicated a negative attitude toward lawyers among those having little contact with them and that commercials of the type aired by defendants convey useful information. He testified, as had defendants' witness Wackman, that the decision-making process is different

when the product in question is legal services rather than a more impulsive sort of purchase such as toilet paper. He opined that emotional appeals in television commercials were not harmful. On cross-examination he testified that his doctoral research on marketing of legal services suffered from some of the same deficiencies he noted in the Hayne survey due to the limited resources available to him at that time.

14. Mark A. Humphrey, defendant Des Moines attorney, testified for defendants concerning the circumstances surrounding his firm's decision to purchase and air television commercials. (Tr. 758-801). He testified generally concerning his profesisonal credentials and the formation and development of his firm as it sought to focus primarily on practice in the areas of personal injury and workers' compensation. Before considering the use of television commercials the firm tried print ads which proved ineffectual and awaited both a United States Supreme Court decision in a lawyer advertising case and the Iowa bar's failure to change Iowa rules as a result of that decision. *In re R.M.J.*, 455 U.S. 191, 102 St.Ct. 929, 71 L.Ed.2d 64 (1982). He expressed concerns about potential clients unaware of matters affecting their legal rights such as statutes of limitation, and stated that the firm's decision to air the commercials without seeking bar approval was due to the following factors: frustration stemming from a previous unsuccessful attempt to obtain bar approval for a print ad that was ultimately not run, belief that Iowa would either change or not enforce applicable rules as a result of certain yellow pages ads that appeared to violate applicable rules without having prompted disciplinary proceedings, and interpretation of the *R.M.J.* decision as rendering Iowa's rules unconstitutional. He expressed a desire to advertise in the future to the fullest extent permitted by the first amendment.

15. Fredd Haas, defendant Des Moines attorney, testified for defendants concerning the circumstances sur-

rounding his firm's decision to purchase and air television commercials. (Tr. 803-836). He testified generally concerning his professional credentials and the formation and development of his firm. He testified that the firm had participated in the bar association's lawyer referral service with little effect and that, in his opinion, some yellow pages ads placed by other attorneys violated applicable Iowa rules. Responses to the firm's televised commercials were mostly from persons unaware of such matters affecting their legal rights as statutes of limitation. He testified that the yearly cost to the firm for the commercials would be upwards of $20,000, of which $10,000 would go to the Denver firm producing them with the remainder to WHO for air time. He testified that he maintained a continuing interest in issues relating to legal advertising and that the firm's business decision not to air TV commercials that would comply with the Iowa rules was due to a lack of resources to independently produce such a commercial and doubts as to the effectiveness of such a commercial. He testified that the firm had been advised by the bar association that no change in the Iowa rules was contemplated in the absence of a challenge to their validity.

APPENDIX J

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

No. 85-

MARK A. HUMPHREY AND FREDD J. HAAS,
d/b/a HUMPHREY & HAAS,
Appellants,

v.

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT
OF THE IOWA STATE BAR ASSOCIATION,
Appellee.

AFFIDAVIT

Norton C. Frickey, II, being first duly sworn upon his oath, states:

1. I am a competent adult and have no legal disabilities which would render me ineligible to testify as a witness.

2. I have first-hand knowledge of each statement contained herein.

3. I am employed as the Vice-President for Network Affiliates, Incorporated. Network Affiliates produces and syndicates television ads for attorneys throughout the United States. It also purchases air time for attorneys who use its ads. Network affiliates produced the television ads which the Iowa Supreme Court prohibited Mark A. Humphrey and Fredd J. Haas from airing. We have produced about 100 different ads of this type.

4. Since 1982, our ads have been aired on a regular basis by attorneys with home offices in forty states and over 125 cities

and in the District of Columbia. They have been shown over 275,000 times nationwide.

5. I contacted the major television stations in Iowa (as listed in the Arbitron Rating Guide) and asked them whether any attorneys were advertising on their stations.

6. The following is a listing of the television stations I contacted, the name of the person I spoke with, and the information which that person gave me.

(1) KCCI-TV, Des Moines, Iowa. I spoke with Max Rauer, the sales manager. He told me that there were no attorneys currently advertising "due to the Iowa Supreme Court ruling."

(2) KCBR-TV, Des Moines, Iowa. I spoke with Dan Havens, the general manager. He stated that one attorney, Van Borheis, advertised with a voice over graphics, in compliance with the Iowa Rule. This attorney had only advertised a few times.

(3) WHO-TV, Des Moines, Iowa. I was told by their sales manager that because of the 1984 Iowa Supreme Court decision in this case, they had not aired any lawyer's ads.

(4) WOC-TV, Davenport, Iowa. I spoke with Tom Heston, the local sales manager. He told me that no Iowa attorney had ever advertised on his station.

(5) KCJB-TV, Davenport, Iowa. I spoke with Donald Wakefield, the account representative. He told me that no attorney had ever advertised on his station.

(6) KGAN-TV, Cedar Rapids, Iowa. I spoke with Michael Cango, the local sales manager. He told me that no Iowa attorney had ever advertised on his station.

(7) KWWL-TV, Cedar Rapids, Iowa. I spoke with Ron Johnson, the vice president. He told me that no lawyer had ever advertised on his station.

(8) KDUB-TV, Dubuque, Iowa. I spoke with Marshall Porter, the sales manager. He stated that no lawyer had ever advertised on his station.

(9) KCRG-TV, Cedar Rapids, Iowa. I spoke with Jim Oetken, who told me that they had never carried any lawyer advertising.

(10) WOI-TV, Ames, Iowa. I spoke with their sales manager, who told me that one firm advertised in compliance with the Iowa rules for a brief period.

(11) KTIV-TV, Sioux City, Iowa. I spoke with their sales manager, who told me that the law firm of Lane & Lane had advertised in compliance with the Iowa rules, but only for a short time.

(12) KOIA-TV, Ottumwa, Iowa. I spoke with Paul Vaughn, the sales manager. He stated that no lawyer had ever advertised on his station.

(13) KMEG-TV, Sioux City, Iowa. I spoke with Carl Keller, the sales manager. He stated that only one lawyer had ever advertised (William J. Lane, III) but that Mr. Lane had no plans for future advertising "due to the Supreme Court ruling." Mr. Lane used ads which complied with the rules of the Iowa Supreme Court and did not run them very many times.

(14) KCAU-TV, Des Moines, Iowa. I spoke with Greg O'Connor, the general manager. He stated that no lawyer had ever advertised on his station.

/s/ Norton C. Frickey, II

NORTON C. FRICKEY, II
Vice President, Network Affiliates, Inc.

STATE OF COLORADO)
) ss.
COUNTY OF JEFFERSON)

On January 28, 1986, Norton C. Frickey, II, personally appeared before me, and having been first duly sworn, stated that each fact contained in this affidavit is true and correct.

/s/ DIDIE L. GRANDSTAFF

Notary Public

My Commission Expires 12/8/87.

Supreme Court, U.S.
FILED
MAR 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1343 (3)

In The

Supreme Court of the United States

October Term, 1985

—o—

MARK A. HUMPHREY and FRED J. HAAS
d/b/a HUMPHREY & HAAS,

Appellants,

v.

COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION,

Appellee.

—o—

On Appeal from a Judgment of the Iowa Supreme Court

—o—

MEMORANDUM OF APPELLEE AND MOTION TO AFFIRM COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION

—o—

NICK CRITELLI*
Nick Critelli and Associates
500 First Interstate Bank Bldg.
Des Moines, Iowa 50309

FRANK A. COMITO
Comito and Capps
1332 Grand Ave.
West Des Moines, Iowa 50322

Counsel for Appellee

*Counsel of Record

March 11, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

18 pp

QUESTION PRESENTED

MAY THE STATE PROHIBIT THE USE OF DRAMATIZATIONS REGARDING LAWYER TELEVISION ADVERTISING ON THE BASIS THAT DRAMATIZATION FACILITATES APPEALS TO THE EMOTIONS, PREJUDICE, LIKES OR DISLIKES OF THE VIEWING PUBLIC AND INHIBITS THE EXERCISE OF AN INTELLIGENT OR RATIONAL DECISION-MAKING PROCESS IN DETERMINING THE NEED FOR AND CHOICE OF AN ATTORNEY.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

I. REQUEST FOR PLENARY CONSIDERATION 1

Statement in Support of Plenary Consideration 1

II. MOTION TO AFFIRM 2

Statement in Support of Motion to Affirm 2

History Underlying DR 2-101 (A) and (B) 3

Factual Basis for Regulation 4

1. Potential for abuse: emotion and dramatization. 5

2. Potential for abuse: immediacy of the media. 5

3. Potential for abuse: pervasiveness of the media. 7

"Special Problems" of the Electronic Medium 8

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES:

Bates vs. State Bar of Arizona, 433 U.S. 350 (1977) 1, 2, 4, 10, 12

Bolger vs. Youngs Drug Products Corp., 463 U.S. 60 (1983) 1, 9

Capital Broadcasting Co. vs. Mitchell, 333 F. Supp. 582 (D.C. Dist. 1971), aff'd, 405 U.S. 1000 and aff'd without op National Association of Broadcasters vs. Kliendienst, 405 U.S. 1000 (1972) 10

Consolidated Edison vs. Public Service Commission, 447 U.S. 530 (1980) 10

Columbia Broadcasting System vs. Democratic National Committee, 412 U.S. 94 (1973) 6, 7, 9

Federal Communications Commission vs. Pacifica Foundation, 438 U.S. 726 (1978) 7, 9

In Re: R.M.J., 455 U.S. 191 (1982) 1, 2

National Broadcasting Company vs. United States, 319 U.S. 190 (1943) 8, 9

Ohralik vs. Ohio State Bar Association, 436 U.S. 447 (1978) 2

Rapp and Gillium vs. Committee, 504 F. Supp. 1092 (D.C. Iowa 1980) 4

Red Lion Broadcasting Company vs. Federal Communications Commission, 395 U.S. 367 (1969) ... 9

Zauderer vs. Office of Disciplinary Counsel, 471 U.S. —, 105 S.Ct. 2265; 85 L.Ed. 2d 652 (1985) 1

TABLE OF AUTHORITIES—Continued

STATUTORY PROVISIONS:

	Pages
Iowa D.R. 2-101 (A) and (B)	3, 4
New Jersey Rule 7.2	1
West Virginia DR 2-101(B)	1
Ohio, DR 2-101 (C)	1
Wyoming, DR 2-101 (B)	1
15 U.S.C. 1335	10, 11, 12
18 U.S.C. 2512(1)(c)	12

OTHER AUTHORITIES:

Kinter *A Primer on the Law of Deceptive Practices,* MacMillan Pub. Co. 1971, p. 347	12

I.

REQUEST FOR PLENARY CONSIDERATION

Appellee hereby requests the Court to grant jurisdiction and give plenary consideration to this appeal.

Statement in Support of Plenary Consideration

This case presents to the Court a case of first impression involving the power of a State to regulate certain techniques employed in lawyer electronic medium advertising. While the Court has heretofore set the parameters of lawyer print advertising,[1] it has consistently excluded electronic medium advertising from its holdings.[2] As a result thereof the States have adopted varying and sometimes conflicting rules regarding electronic medium regulation.[3] Appellee joins with Appellant and requests the Court to grant plenary consideration to this appeal.

———o———

---

[1] Bates vs. State Bar of Arizona, 433 U.S. 350 (1977); In Re: R.M.J., 455 U.S. 191 (1982); and Zauderer vs. Office of Disciplinary Counsel, 471 U.S. —, 105 S. Ct. 2265; 85 L.Ed. 2d 652 (1985).

[2] Bates vs. State Bar of Arizona, 433 U.S. 350 at 384 (1977); in Re: R.M.J., 455 U.S. 191 at 201 fn. 13 (1982); Zauderer vs. Office of Disciplinary Counsel, 471 U.S. —; 85 L.Ed. 2d 652 at 687 fn. 1 (1985); and Bolger vs. Youngs Drug Products Corp., 463 U.S. 60 at 74 (1983).

[3] For example, New Jersey's Rule 7.2 prohibits dramatizations, music, drawings, animation or lyrics; West Virginia's DR 2-101(B) prohibits any use of the electronic medium; Ohio's DR 2-101(C) prohibits subjectively self-laudatory advertising; and Wyoming's DR 2-101(B) prohibits television advertising.

II.

MOTION TO AFFIRM

In the alternative Appellee moves the Court to affirm the decision of the Iowa Supreme Court.

Statement In Support Of Motion To Affirm

Iowa Code of Professional Responsibility DR2-101 (A) and (B) does not prohibit the use of the electronic broadcast medium by lawyers wishing to engage in advertising. It seeks, however, to regulate certain methods or tools of persuasion employed in commercial radio and television advertisements. Dramatizations and emotional appeals targeting the prejudice, likes or dislikes of the viewing public are regulated as being contrary to the articulated state interest that the public exercise an intelligent or rational decision making process in determining the choice of an attorney.[4]

Iowa DR 2-101(A),[5] in pertinent part, states:

"A lawyer shall not, on the lawyer's own behalf or that of a partner, associate or any other lawyer affil-

---

[4] The concept of intelligent and rational decision-making in the determination of the need for legal services and the selection of a particular lawyer has been judicially recognized in Bates vs. State Bar of Arizona, 433 U.S. 350 (1977), In Re: R.M.J., 455 U.S. 191 (1982); and Ohralik vs. Ohio State Bar Association, 436 U.S. 447 (1978). This state interest was formally adopted by Iowa as the basis for its Rule in the Comments to DR 2-101 as evidenced in Trial Exhibit 3. At the trial of this case, former Iowa Supreme Court Justice Robert Allbee testified that in adopting the Rule, the Iowa Supreme Court felt that it was necessary that the public exercise an intelligent or rational decision making process in determining the choice of an attorney. To facilitate this goal the public should have objective informative data rather than the dramatic, persuasive or promotional type of commercial appeal. Trans. 95.

[5] Appendix D. p. 58a.

iated with the lawyer or the lawyer's firm, use, or participate in the use of any form of public communication which contains any false, fraudulent, misleading, deceptive, self-laudatory or unfair statements, which contains any statements or claim relating to the quality of the lawyer's legal services, which appeals to the emotions, prejudices, or likes or dislikes of a person or which contains any claim that is not verifiable; . . ."

In addition to the prohibition against appeals to the emotion, DR 2-101 (B)[6] makes the following regulation regarding the use of certain electronic medium techniques:

" . . . The same information, in words and numbers only, articulated only by a single non-dramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio. The same information, in words and numbers only, articulated by a single non-dramatic voice, not that of the lawyer, and with no other background sound, may be communicated by television. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer."

History Underlying DR 2-101(A) and (B)

This case presents to the Court a complete factual record, not only with respect to the appellants' violation of the rule in question, but also regarding the factual or "legislative history" underlying the Rule.

DR 2-101 (A) and (B) seek not to prohibit the use of the electronic medium, but to regulate the potential for its abuse. The rule seeks to prohibit the use of certain tools or techniques that have been identified as causing abuse of the electronic medium. The tool or advertising technique in question is television dramatization.

---

6 Appendix D. p. 58a.

As a result of the Court's holding in *Bates vs. State Bar of Arizona,* 433 U.S. 350 (1977) the Iowa Supreme Court directed the Committee on Professional Ethics and Conduct of the Iowa State Bar Association, as a Commission of that Court, to conduct hearings regarding lawyer advertising. On December 13, 1979 a hearing was held and expert testimony was taken regarding the state interest sought to be furthered by lawyer advertising, the potential for abuse from certain advertising techniques and the extent of any regulation regarding the use of those techniques. Thereafter the Iowa Supreme Court, en banc, at a public hearing, received the Committee's recommendation, the testimony introduced before the Committee and additional briefs and arguments from the public. After due deliberation, the Iowa Supreme Court promulgated DR 2-101 (A) and (B). A transcript of that hearing was introduced into evidence during the trial of the case at Bar, identified as Trial Exhibit 16a.[7]

Factual Basis for Regulation

In its holding upon remand, the Iowa Supreme Court articulated three bases for its decision in upholding the prohibition upon television dramatization: the potential for abuse as indicated in the Committee hearings, the fact that as contrasted from the print media, electronic medium

---

[7] Trial Exhibit 16a. Likewise, for a detailed factual recitation regarding the procedure and background of the Rule, see Rapp and Gillium vs. Committee, 504 F. Supp. 1092 (D.C. Iowa 1980).

advertising tolerates less deliberation, and the pervasiveness of the medium.[8]

1. Potential for abuse: emotion and dramatization.

With respect to the potential for abuse, the Court relied upon the expert testimony produced before the Committee and later the Iowa Supreme Court regarding the media itself.[9] As indicated in Trial Exhibit 16a, the Committee received the expert testimony of Leonard J. Howe, executive director of Iowa Broadcasting Network. Mr. Howe testified that while there are dangers in any advertising, there are more dangers in the area of professional advertising.[10] Regarding television, Mr. Howe testified that while the element of imagination is removed (as compared to radio) motion and all of the elements of drama are added " . . . so it is the ultimate in the dramatic or emotional form of the media".[11] Mr. Howe further testified that while all three forms of communication—print, radio and television—can be abused, television, because it has more elements of drama is the most abused.[12]

2. Potential for abuse: immediacy of the medium.

Abuse of media was further found due to the immediacy of the medium and the design of the commercials in question. The Iowa Supreme Court found that:

---

8 Opinion, Appendix B, pp. 31a-32a.

9 Opinion, Appendix B, pp. 31a-32a.

10 Trial Exhibit 16a, p. 62.

11 Trial Exhibit 16a, pp. 67-68.

12 Trial Exhibit 16a, p. 70.

> "Electronic media advertising, when contrasted with printed advertising, tolerates much less deliberation by those at whom it is aimed. Both sight and sound are immediate and can be elusive because, for the listener or viewer at least, in a flash they are gone without a trace. Lost is the opportunity accorded to the reader of printed advertisements to pause, to re-study, and to thoughtfully consider."[13]

This finding is accorded support not only in the factual testimony underlying the Rule,[14] but also by the Court in *Columbia Broadcasting System vs. Democratic National Committee*, 412 U.S. 94 (1973).

When the immediacy of the electronic medium was coupled with the design of the Appellant's commercials, the Iowa Supreme Court found the antithesis of rational decision-making. During the trial of this case, one of the members of Appellant's lawfirm, with some measure of experience in television broadcasting, admitted that the design of the commercials was to "prompt the viewer to make a phone call immediately".[15] The commercials were further designed so that when the advertisement "was flashed on the screen with the phone number, and the phone number repeated twice, that was designed, I believe, to promote those individuals to write it down or even better grab the phone and make a call."[16]

---

13 Opinion, Appendix B, pp. 29a, 31a.

14 Opinion, Appendix B, pp. 31a-32a.

15 Opinion, Appendix B, pp. 31a-32a. Likewise, see testimony of James Gritzner, Trans. 48-49.

16 Testimony of James Gritzner, Trans. 49.

3. Potential for abuse: pervasiveness of the medium.

Finally, the Iowa Supreme Court based its holding upon the effects of the ubiquitous and pervasive nature of the medium itself. The holding finds support in the Court's holding in *Columbia Broadcasting System vs. Democratic National Committee,* 412 U.S. 94, 128 (1973):

> " . . . The captive nature of the broadcast audience was recognized as early as 1924, when Commerce Secretary Hoover remarked at the Fourth National Radio Conference that 'the radio listener does not have the same option that the reader of publications has—to ignore advertising in which he is not interested—and he may resent its invasion of his set.' As the broadcast media have become more pervasive in our society, the problem has become more acute."

Likewise, in *Federal Communications Commission vs. Pacifica Foundation,* 438 U.S. 726, 748 (1978) the Court echoed it's earlier pronouncement in *Columbia:* . . . "the broadcast media have established a uniquely pervasive presence in the lives of all Americans".

These concepts were likewise the subject of expert testimony during the hearing on the rule. As stated by the Iowa Supreme Court[17] "One expert witness explained: ' . . . You are watching a television program. The ad is there. It intrudes upon your area of visibility, and forces itself upon you, but a print ad is not the same way.' "

---

17 Opinion, Appendix B, p. 32a; Trial Exhibit 16a, p. 43.

"Special Problems" of the Electronic Medium

As indicated previously, the Court has consistently singled out the electronic medium for eventual special consideration with respect to regulations regarding lawyer advertising. However, as it concerns lawyer advertising, no definitive ruling exists regarding the nature of the "special problems" posed by this medium of communication. The Court in issuing its presage with respect to the electronic medium, has referenced several cases, a review of which becomes essential to an understanding of the "special problems" connected with the use of the electronic medium.

In reviewing prior Supreme Court decisions regarding the electronic medium, two factors emerge, each formulating a basis for regulating the use and content of the electronic medium: first, accessibility and secondly, the ubiquitous and pervasive nature of the medium itself.

Unlike the print media, the electronic broadcast medium has been subject to less First Amendment protection. It is the inherent differences between the media that justify the distinction in regulation. The accessibility of print media for communication is relatively unlimited as compared to the limited availability and accessibility of the electronic medium.[18] Accessibility, consequently, has been a basis for control over the use of the medium it-

---

[18] National Broadcasting Company vs. United States, 319 U.S. 190 (1943).

self,[19] and, the content of broadcast under the "fairness doctrine".[20]

Control, both over the use of the medium as a whole, as well as the content of programming and advertisement, has been based upon the ubiquitous and pervasive nature of the broadcast medium. In *F.C.C. vs. Pacifica,* 438 U.S. 726 (1978) the Court, based its decision upholding the Federal Communication Commission's order regulating the time of broadcast of comedian George Carlin's infamous "dirty word monologue", upon the fact that television, unlike all other media "confronts the citizen, not only in public, but also in the privacy of the home where the individual's right to be left alone plainly outweighs the First Amendment."[21]

While "the short, though regular, journey from mail box to trash can [may] be an acceptable burden, at least so far as the Constitution is concerned",[22] with respect to the recipient of unwanted direct mail advertisements, the ubiquitous and invasive nature of electronic medium are not so easily controlled.[23]

---

19 National Broadcasting Company, supra, regarding the use of chain network transmission.

20 Red Lion Broadcasting Co. vs. Federal Communications Commission, 395 U.S. 367 (1969), and Columbia Broadcasting System, Inc. vs. Democratic Nat. Committee, 412 U.S. 94 (1973), regarding political advertising.

21 438 U.S. at 747.

22 Bolger vs. Youngs Drug Products Corp., 463 U.S. 60 (1983).

23 Columbia Broadcasting System vs. Democratic Committee, 412 U.S. at 128.

Audience captivity has formulated the basis for prohibition or regulation in areas other than the electronic medium. In *Consolidated Edison vs. Public Service Commission,* 447 U.S. 530 (1980), the Court stated:

> "Where a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intrusive unless the "captive" audience cannot avoid objectionable speech. Passengers on public transportation, see, Lehman v. Shaker Heights, 418 U.S. at 307-308, 41 L. Ed. 2d 770, 94 S. Ct. 2714 (Douglas, J. concurring in judgment), or residents of a neighborhood disturbed by the raucous broadcasts from a passing sound truck, cf. Klovacs v. Cooper, 336 U.S. 77, 93 L. Ed. 513, 69 S. Ct. 448, 10 ALR 2d 608 (1949), may well be unable to escape an unwanted message." 447 U.S. at 542.

Perhaps the most significant restriction of the use of the electronic medium for advertising, and the most analogous to the case at Bar, concerns 15 U.S.C. 1335 declaring it:

> " . . . unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."

The statute, and its legislative history, is important with respect to the case at Bar inasmuch as the Court, in excluding the electronic broadcast medium from its general holding in *Bates*[24] referred to *Capital Broadcasting Co. vs. Mitchell* (1971 D.C. Dist.), 333 F. Supp. 582, aff'd 405 U.S. 1000, and aff'd without op *National Association of Broadcasters vs. Kliendienst,* 405 U.S. 1000 (1972).

---

[24] Bates vs. State Bar of Arizona, 433 U.S. 350 at 384.

In Capital Broadcasting, an action was brought to enjoin the operation of 15 U.S.C. 1335 prohibiting the use of television in cigarette advertising. The court found that as a result of the factual information available to Congress, a rational basis existed for a statute prohibiting the use of the electronic medium with respect to cigarette advertising.

The action of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association, as Commissioners of the Iowa Supreme Court, with respect to regulating lawyer television advertising, is not unlike that of Congress in regulating cigarette advertising. As with Congress in the cigarette advertising context, a potential harm to the public from the use of television as an advertising media was identified. Like Congress in the cigarette advertising context, the Committee conducted hearings and identified a potential harm to the public from the unrestricted use of television as an advertising medium with respect to lawyer advertising. However, unlike Congress, the Committee chose not to create an outright prohibition on the use of the electronic medium. It limited its regulation to only those techniques that were essential for abuse of the medium . . . dramatization.

It is submitted that the Committee had before it ample evidence, in the form of expert testimony, of the potential for abuse of the electronic medium. Mr. Roy Follett and Mr. Leonard J. Howe, two individuals whose expertise remains unchallenged, alerted the Committee to the fact that television, because it has more elements of drama, is the most abused of the three medium—print, radio and television.[25]

---

[25] Trial Exhibit 16A, p. 70.

The testimony of Mr. Follett and Howe, finds corroboration in *Kinter*[26]:

> "Misrepresentation can occur not only directly and indirectly through verbal and written statements, but also through pictorialization and characterization. One may be scrupulously honest with words and still be fostering deception by means of pictures and sketches that insinuate or blatantly present a falsehood.
>
> The range of pictorial deception is potentially as wide as the whole gamut of false advertising and perhaps more dangerous. The printed word speaks to the mind, it asks a potential customer to believe a claim. A picture 'proves' to the mind, through the eye, the validity of that claim."

If the State has a legitimate interest in facilitating the process of intelligent selection of lawyers, and to assist in making legal services fully available[27] then it must be allowed to promulgate rules designed to foster that interest. Such was the case with the Congressional enactment of 15 U.S.C. 1335 regarding cigarette advertising, and 18 U.S.C. 2512(1)(c)(ii) prohibiting the advertising of electronic devices for use in surreptitious interception of communications. Unlike those statutes, DR 2-101 seeks not to prohibit the use of the medium completely, but only to eliminate the techniques essential for abuse of the medium.

———o———

---

26 *A Primer on the Law of Deceptive Practices,* MacMillan Pub. Co., 1971, p. 347.

27 Bates, 433 U.S. at 377.

CONCLUSION

Appellee submits that a sufficient factual basis exists in the record to support the finding by the Iowa Supreme Court that television commercials that appeal solely to the emotions, likes or dislikes of the viewing public are contrary to the policy of rational decision-making in the determination of the need for legal services and the choice of an attorney, that dramatizations facilitate such abuse, and that the least intrusive method of regulation is not to prohibit access to the medium, but to eliminate the tool for abuse . . . dramatization.

Appellee respectfully requests the Court to affirm the decision of the Iowa Supreme Court.

State supreme courts and lawyer disciplinary bodies need constitutional guidance regarding electronic medium lawyer advertising. This case presents the Court with an unresolved issue of national importance, an adequate factual basis for the Rule in question, as well as an extensive record regarding the effect of the operation of the rule. Appellee joins Appellant and requests that the Court grant plenary consideration to the appeal, or in the alternative to affirm the judgment.

Respectfully submitted,

NICK CRITELLI*
NICK CRITELLI AND ASSOCIATES
500 First Interstate Bank Bldg.
Des Moines, Iowa 50309

FRANK A. COMITO
COMITO AND CAPPS
1322 Grand Avenue
West Des Moines, Iowa 50322

Counsel for Appellee

March 11, 1986

*Counsel of Record